TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

[fol. 1] [Caption omitted.]

[fol. 2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 3706

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Plaintiff,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, a corporation of the State of Virginia, Defendant

COMPLAINT—Filed August 12, 1947

1. Plaintiff is a corporation incorporated under the laws of the District of Columbia. The matter in controversy exceeds, exclusive of interest and cost, the sum of $3,000.00. Jurisdiction in this Court is based on Par. 41 (1) Title 28 of the United States Code.

2. The Defendant is a corporation of the State of Virginia duly authorized and licensed to transact business in the State of Maryland through its compliance with Section II of Interstate Commerce Act as amended.

3. On or about September 30, 1942, the Plaintiff executed and delivered in Baltimore, Maryland, as insurer, a certain contract and insurance policy with the Defendant as insured, said policy being numbered 62321, the original of which is in the possession of the Defendant. A certificate thereof was filed in the office of the Interstate Commerce Commission, Section of Insurance, at Washington, District [fol. 3] of Columbia, on October 10, 1942, in compliance with Section II of Interstate Commerce Act as amended. The said automobile liability policy, number 62321, insured the Defendant against liability by reason of accidents in accordance with the terms of the policy and contained a duly authorized and executed "Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability, and Property Damage Liability, Under Section 215 of the Interstate Commerce Act" which was attached to and formed a part of said policy. Said endorsement contained the following express language:

"The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement."

4. Under the terms of the said automobile liability policy number 62321 the insured was required to notify the insurer in writing of the occurrence of any accident, giving the time, place and circumstances of said accident, and said policy also contained the following provision:

"If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

5. On or about May 12, 1943, the Defendant, in the course of its business as common carrier of freight, was involved through its motor vehicle equipment in an accident at the plant of the Joseph Dixon Crucible Company in Jersey City, New Jersey, whereby personal injuries were sustained by Carlogero Martorano and Salvatore Perrone, employees of [fol. 4] the said Joseph Dixon Crucible Company.

6. No notification in writing was given by the Defendant, Tidewater Transfer Company, Incorporated, of the occurrence of said accident to the Plaintiff, in violation of the terms of the aforementioned automobile policy, number 62321.

7. On or about February 18, 1944, the said Carlogero Marterano and Salvatore Perrone filed suit against the said Defendant in the New Jersey Supreme Court of Hudson County for personal injuries sustained in said accident of May 12, 1943; and on or about February 15, 1944, the Defendant was duly served with the complaint in the above mentioned action by service on William V. Lee, in Trenton, New Jersey, who was its designated agent for service of notices, orders and processes. The original of said designation of William V. Lee is on file with the Interstate Commerce Commission, as required under Section II of the Interstate Commerce Act as amended.

8. Contrary to the above mentioned specific terms of said automobile liability policy, number 62321, the Defendant did

not forward to the Plaintiff the summons and copy of said complaint which had been served on its duly authorized agent as aforesaid.

9. On or about March 25, 1944, an interlocutory judgment by default was entered against said Defendant, and on or about September 1, 1944, notice to assess damages in said action was served on said William V. Lee, duly authorized [fol. 5] agent for the Defendant as aforesaid. No notice of said motion to assess damages was forwarded to the Plaintiff in violation of the terms of said automobile policy. On or about October 4, 1944, a further notice concerning the assessment of damages was served on the duly authorized agent for said Defendant; and no notice thereof was sent to the Plaintiff, in violation of the terms of said policy of insurance.

10. On November 13, 1944, the New Jersey Supreme Court entered final judgment for Carlogero Martorano against the Defendant for $5,535.10, and final judgment for Salvatore Porrone against the Defendant for $185.10.

11. The Plaintiff had entered into written agreement with Peerless Casualty Company of Keene, New Hampshire, on August 30, 1937, whereby the Peerless Casualty Company was to execute certain surety bonds required as a condition precedent to operation of the insureds of the Plaintiff in those States where the Plaintiff was not licensed to transact insurance business, and wherein the insureds transacted business under Section II of the Interstate Commerce Act as amended. Said agreement provided that the liability which Peerless Casualty Company assumed as surety would be fully satisfied and discharged by the Plaintiff to the extent of One Hundred per centum of any loss or liability of any kind which should accrue because of the execution by Peerless Casualty Company of any bond executed at the request of the Plaintiff on behalf of any of the Plaintiff's insureds. On or about March 13, 1945, Carlogero Martorano and Salvatore Perrons instituted suit on surety bond [fol. 6] in which Peerless Casualty Company was surety and Defendant principal on said judgments theretofore obtained against said Defendant.

12. On or about January 18, 1945, the Plaintiff received first notice of said accident and said suits, after judgment by default had been entered against the Defendant in New Jersey.

13. On or about April 27, 1945, the Plaintiff herein entered into a non-waiver agreement with the Defendant providing that the Plaintiff, herein by undertaking the investigation and defense of the claims of said Carlogero Martorano and Salvatore Perrons, arising out of said accident, did not waive any provision or condition of said policy.

14. On or about April 2, 1945, the Plaintiff filed a motion in the suit of the said Carlogero Martorano and Salvatore Perrone against Tidewater Transfer Company, Incorporated, praying for a rule to show cause why the judgments by default should not be set aside so that the Defendant herein, Tidewater Transfer Company, Incorporated, might enter its appearance and defend the action on its merits.

15. On or about April 10, 1945, by order of Chief Justice Thomas J. Brogan of the New Jersey Supreme Court two bonds were filed with the Defendant herein as principal and Peerless Casualty Company as surety for the sums of $11,000, and $300 respectively, conditioned upon payment of said judgments in favor of said Carlogero Martorano and Salvatore Perrone, together with interest and costs in the event said judgments by default against the Defendant were not stricken out.

[fol. 7] 16. On or about July 18, 1946, by order of Chief Justice Clarence E. Case of the New Jersey Supreme Court the rule to show cause why said judgments by default should not be stricken out was discharged, and said judgments against Tidewater Transfer Company, Incorporated, were made final.

17. The Plaintiff was required to pay said judgments of Carlogero Martorano and Salvatore Perrone against the Defendant under the terms of said policy by reason of said accident together with interest, court costs and counsel fees. Under the terms of said policy heretofore referred to in Paragraph 3, the insured, the Defendant, agreed to reimburse the insurer for any payment as therein set out. No notice of said accident and of said suit having been forwarded to the Plaintiff, the Defendant is therefore liable to the Plaintiff for the full amount of said judgments heretofore paid by it, together with court costs, counsel fees and interest. The sum of $6,384.34 was paid by the Plaintiff in payment of the default judgments against the Defendants; and the further sum of $1,340.10 was expended by the Plaintiff as counsel fees and other expenses in the preparation

and trial of the aforementioned rule to show cause why the default judgments should not have been stricken out.

Wherefore, Plaintiff demands judgment against Defendant for the sum of Ten Thousand Dollars, interest and costs to the date of payment.

——— ———Plaintiff, By Theodore Sherbow, 1023 Munsey Building, Baltimore 2, Maryland, Attorney for Plaintiff.

[fol. 8] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

MOTION TO DISMISS—Filed September 2, 1947

Tidewater Transfer Company, Incorporated, by Wendell D. Allen and Francis B. Burch, its Attorneys, appearing specially herein for the sole purpose of this Motion, moves to dismiss the Complaint in this cause for the following reasons:

1. The Court lacks jurisdiction over the subject matter in that the Plaintiff has failed to allege facts which confer jurisdiction upon it.

2. Neither the Plaintiff nor the Defendant are residents of the State of Maryland.

3. To permit Plaintiff to prosecute its alleged claim in this Court would constitute an unreasonable burden on interstate commerce.

4. The summons in this case was not served upon a duly constituted attorney or agent of the Defendant authorized to accept service of process in an action such as one set forth in Plaintiff's Complaint.

5. And for other reasons to be adduced at the hearing.

Wendell D. Allen, Francis B. Burch, Attorneys for Defendant, Tidewater Transfer Company, Incorporated, appearing specially for the sole purpose of this Motion, 310-314 Equitable Bldg., Baltimore, Md.

Service of copy admitted this 2nd day of September, 1947.
Theodore Sherbow (E. M.), Attorney for Plaintiff.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil No. 3706

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Plaintiff,

vs.

TIDEWATER TRANSFER COMPANY, INC., Defendant

ORDER OF COURT DISMISSING COMPLAINT—Filed 18th September, 1947

The complaint in the above matter and the motion to dismiss the complaint having come on for hearing and the matter being submitted, and the facts showing that the plaintiff is a corporation of the District of Columbia and that the Defendant is a corporation of the State of Virginia, and the Court being of the opinion, for the reasons set forth in its earlier opinion in Feely v. Sidney S. Schupper Interstate Hauling System, Inc. and Breeding v. Same, — Fed. Sup. —, that the Act of Congress of April 20th, 1940, 54 Stat. 143, is unconstitutional to the extent that it amends Section 41(1)(b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States, it is therefore

Ordered this 18th day of September, 1947, by the District Court of the United States for the District of Maryland, that the complaint is hereby dismissed, costs to be paid by the plaintiff.

William C. Coleman, U. S. District Judge.

[fol. 10] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

NOTICE OF APPEAL—Filed September 18, 1947

Notice is hereby given that the National Mutual Insurance Company of the District of Columbia, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the order dismissing the complaint

of the Plaintiff for lack of jurisdiction entered in this action on September 18, 1947.

Theodore Sherbow, Attorney for Appellant, National Mutual Insurance Company of the District of Columbia, 1023 Munsey Building, Baltimore 2, Maryland.

Service of copy admitted this 18th day of September, 1947.
Wendell D. Allen, Attorney for Appellee.

[fol. 11] In United States District Court

[Title omitted]

Joint Designation of Record—Filed September 19, 1947

Mr. Clerk:

Please prepare a Transcript of Record on the Appeal of the Plaintiff noted herein on the 18th day of September, 1947, and include therein the following:

1. Complaint.
2. Defendant's Motion to Dismiss.
3. Order of Court Dismissing Complaint.
4. Plaintiff's Notice of Appeal.
5. Designation as to Record.

Theodore Sherbow, Attorney for Appellant. Wendell D. Allen, Attorney for Appellee.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

versus

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

October 1, 1947, the transcript of record is filed and the cause docketed.

APPEARANCES

Same day, the appearance of Theodore Sherbow is entered for the appellant.

Same day, the appearance of Wendell D. Allen and Francis B. Burch is entered for the appellee.

PETITION OF APPELLANT FOR CERTIFICATE UNDER SECTION 401, TITLE 28, U. S. C.—Filed October 10, 1947

Petitioner, National Mutual Insurance Company of the District of Columbia, respectfully directs the Court's attention to the Act of August 24, 1937, 28 U. S. C. Sec. 401, providing that "whenever the constitutionality of any Act of [fol. 14] Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding . . . the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General."

And further says that the above titled case contains such a constitutional question as contemplated by the above Act of Congress.

Wherefore, your Petitioner respectfully prays that these proceedings shall be certified to the Attorney General as provided by said Act.

And, as in duty bound, etc.

For the Appellant, Theodore Sherbow, 1023 Munsey Building, Baltimore 2, Maryland.

CERTIFICATE—Issued October 10, 1947

Pursuant to the Act of Congress of August 24, 1937 (section 401 of title 28, United States Code) the United States Circuit Court of Appeals for the Fourth Circuit certifies that in the above entitled case now pending in this Court the constitutionality of the Act of Congress of April 20, 1940 (54 Stat. 143), affecting the public interest is drawn in [fol. 15] question and that the United States or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, and this Court having jurisdiction of said suit and proceedings certifies such fact to The Attorney General of the United States.

The United States is hereby, therefore, given permission to intervene and become a party in said case for presentation of argument upon the question of the constitutionality of such Act as The Attorney General may be advised.

October 10, 1947.

John J. Parker, Senior Circuit Judge.

October 11, 1947, certified copy of certificate, together with copy of transcript of record, transmitted by mail to The Attorney General of the United States.

October 14, 1947, brief and appendix on behalf of the appellant are filed.

November 5, 1947, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

November 14, 1947 (November term, 1947), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 16] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

versus

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

OPINION—December 31, 1947

Appeal from the District Court of the United States for the District of Maryland, at Baltimore. Civil

(Argued Nov. 14, 1947)

Before Parker, Soper and Dobie, Circuit Judges

Theodore Sherbow for Appellant; and Wendell D. Allen and Francis B. Burch (John C. Goddin on brief) for Appellee.

[fol. 17] DOBIE, Circuit Judge:

The National Mutual Insurance Company of the District of Columbia, a corporation of the District of Columbia, filed in the United States District Court for the District of Maryland a civil action against Tidewater Transfer Company, Incorporated, a corporation of the State of Virginia. On motion of the defendant, the District Court dismissed the action upon the ground that the Act of Congress of April 20, 1940, 54 Stat. 143, was unconstitutional insofar as it attempts to confer on the United States District Court for the District of Maryland jurisdiction over a civil action between a citizen of the District of Columbia, as plaintiff, and a citizen of the State of Virginia, as defendant. From this judgment, an appeal has been taken to us.

Section 24 of the Judicial Code, paragraph 1. (b), 28 U. S. C. A. §41(1) gave to the United States District Courts jurisdiction of suits of a civil nature "between citizens of different States;" while the statute before us added the words "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."

As far as we have been able to ascertain, the constitutionality of the Act of April 20, 1940, has never been passed upon by a federal appellate court; while a clear cut division of opinion is found in the cases dealing with this problem in the United States District Courts. The constitutionality of the statute has been upheld in *Winkler* v. *Daniels*, (E. D. Va.) 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Association*, (N. D. Cal.) 55 F. Supp. 925; *Duze* v. *Woolley*, (D. [fol. 18] Hawaii) 72 F. Supp. 422. The statute was held to be unconstitutional in *Willis* v. *Dennis*, (W. D. Va.) 72 F. Supp. 853; *Feely* v. *Sidney S. Schupper Interstate Hauling System* (D. Md.) 72 F. Supp. 663; *Wilson* v. *Guggenheim*, (E. D. S. C.) 70 F. Supp. 417; *Ostrow* v. *Samuel Brilliant Co.* (D. Mass.) 66 F. Supp. 593; *Behlert* v. *James Foundation of New York*, (S. D. N. Y.) 60 F. Supp. 706; *McCarry* v. *City of Bethlehem*, (E. D. Pa.) 45 F. Supp. 385.

We first consider whether Congress, in enacting the Act of April 20, 1940, proceeded under power outlined in Article 3, Section 2 of the federal Constitution which defines the limits of the judicial power of the United States, or whether Congress proceeded under Article 1, Section 8(17) of this Constitution. Article 3, Section 2 of the Constitution provides that the judicial power of the United States shall extend to controversies "between Citizens of different States"; while Article 1, Section 8(17) of the Constitution gives Congress power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. We think that Congress here proceeded under Article 3, Section 2 of the Constitution and that we must affirm the judgment of the District Court declaring the Act of April 20, 1940, unconstitutional. Even though Congress here is deemed to have acted under Article 1, Section 8(17) of the Constitution, we still think (for reasons subsequently set out) that the Act in question is invalid.

In *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445, Chief Justice Marshall denied the jurisdiction of the United States Circuit (now District) Court on the ground that a citizen of the District of Columbia was not a citizen of a State. Said the great Chief Justice: "This depends on the act of congress describing the jurisdiction of that court." [fol. 19] While it is true that he was interpreting only a federal statute (all that was necessary for a decision of that case), it should be noted that both the Constitution and the statute used precisely the same phrase "between Citizens

of different States", hence it would seem that the phrase has the same meaning in the statute that it has in the Constitution. Chief Justice Marshall further stated in this case: "But as the act of congress obviously uses the word 'state' in reference to that term as used in the (federal) constitution, it becomes necessary to inquire whether (the District of) Columbia is a state in the sense of that instrument." We are convinced that he thought that the District of Columbia was not a State within the meaning of Article 3, Section 2, of the Constitution. Near the end of the brief opinion, he declared: "It is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them." (Citizens of the District of Columbia.)

Then he concluded: "But this is a subject for legislative, not for judicial consideration." Counsel for appellant derive great satisfaction from this sentence and contend that the Chief Justice thereby meant that Congress had the power, under Article 3, Section 2, of the Constitution, by appropriate legislation (such as the Act of April 20, 1940,) to give jurisdiction to the federal courts of suits involving citizens of the District of Columbia.

We cannot adhere to this contention of counsel for appellant. In *Willis* v. *Dennis*, 72 F. Supp. 853, 855, Judge Paul said:

> "I have little idea that the great Chief Justice intended any such meaning or that he held any such view. I have no doubt that the term 'legislative' was used in its broader sense and to emphasize the dis-[fol.20] tinction between the power to make the law and the power to interpret it, which latter only is entrusted to the judiciary. In such a sense the formulation of all laws, whether they be embodied in the Constitution or be by enactment of Congress, are legislative functions. The opinion makes it clear that the Chief Justice found the barrier to be the Constitutional provision, not the mere inaction of Congress, and it is notable that for the 136 years following this was accepted as the basis of this decision."

Judge Paul, we believe, correctly interpreted the words in the Hepburn case, and those words, even though they may be classified as dicta, are entitled to no little weight.

In *New Orleans* v. *Winter*, 1 Wheat. 89, 94, Chief Justice Marshall stated:

> "It has been attempted to distinguish a territory from the District of Columbia; but the court is of opinion that this distinction cannot be maintained. *They may differ in many respects, but neither of them is a state in the sense in which the term is used in the constitution.*" (Italics ours.)

Said Chief Justice Fuller, in *Hooe* v. *Jamieson*, 166 U. S. 395, 397:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn* v. *Ellzey*, 2 Cranch 445, February Term, 1805 *'that the members of the American confederacy only are the states contemplated in the Constitution;' that the District of Columbia is not a State within the meaning of that instrument;* and that the courts of the United States have no jurisdiction over cases between citizens of the District of Columbia and citizens of a State." (Italics ours.)

[fol. 41] In *Downes* v. *Bidwell*, 182 U. S. 244, 259, Mr. Justice Brown said:

> "The earliest case is that of *Hepburn* v. *Ellzey*, 2 Cranch 445, in which this court held that under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different *States*, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States." (Italics ours.)

Then, in *O'Donoghue* v. *United States*, 289 U. S. 516, 543, we find this statement of Mr. Justice Sutherland:

> "After an exhaustive review of the prior decisions of this court relating to the matter, the following propositions, among others, were stated as being established:
>
> '1. That the District of Columbia and the territories are not States, *within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States.*'" (Italics ours.)

These cases seem to establish the doctrine that Congress, when its acts under Article 3, Section 2 of the federal Constitution has no power to confer upon the District Courts of the United States jurisdiction over civil actions based upon the fact that some of the litigants are citizens of the District of Columbia. Indeed, we go further and assert that, whatever practical inconveniences or injustices may be thereby entailed, this doctrine is sound in principle.

The cases in the District Courts, holding the Act of April 20, 1940, constitutional seem to concede that this Act cannot be sustained under Article 3, Section 2, of the federal Constitution. These cases are grounded in the doctrine [fol. 22] that Congress here proceeded under Article 1, Section 8, of the Constitution, which gives to Congress power "To exercise exclusive legislation in all Cases whatsoever, over" the District of Columbia, and that the Act of April 20, 1940, is valid as an exercise of Congressional power under Article 1, Section 8, of the Constitution. *Winkler* v. *Daniels*, 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925. With this doctrine we cannot agree.

True it is that the legislative power of Congress over the District of Columbia under Article 1, Section 8, of the Constitution is plenary and far-reaching. Said Mr. Justice Shiras in *Shoemaker* v. *United States*, 147 U. S. 282, 300:

> "* * * the United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia, * * *."

Strong language to the same effect was used by Associate Justice Miller (of the United States Court of Appeals for the District of Columbia) in *Neild* v. *District of Columbia*, 110 F. (2d) 246, 249-251:

> "That delegation is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government. Within the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof, which includes within its breadth all proper powers of legislation. Subject only to those prohibitions of the Constitution which act directly or

by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for [fol. 23] the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."

Even so, we conclude that to a very great extent at least, these powers are territorial. We think Judge Way went too far when he spoke of "the practically unlimited powers granted to Congress over the District which necessarily include jurisdiction over its citizens." *Winkler* v. *Daniels*, 43 F. Supp. 265, 268.

We can find no comfort for the appellant here in *O'Donoghue* v. *United States*, 289 U. S. 516. Quite the contrary. That case held specifically: "The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution." This case has come in for some rather severe criticism. For notes on this case, see 47 Harv. L. Rev. 133; 28 Ill. L. Rev. 569; 9 Ind. L. J. 318; 22 Georgetown L. J. 91; 32 Mich. L. Rev. 103; 2 Geo. Wash. L. J. 84. On this point, however, the *O'Donoghue* case has not been overruled and still remains the law of the land.

In this same case, it was held that Congress (under Article 1, Section 8, of the Constitution) could also confer upon these local courts of the District of Columbia jurisdiction over "administrative or legislative functions" but that this may not be done with federal constitutional courts (established under Article III of the Constitution) outside of [fol. 24] the District of Columbia. 289 U. S. at page 551. Then (on this same page) Mr. Justice Sutherland points out that this dual power of Congress over the courts of the District of Columbia "is not in conflict with the view that Congress derives from the District clause (Article 1, Section 8, of the Constitution) distinct *powers in respect of the constitutional courts of the District (of Columbia) which Congress does not possess in respect of such courts outside the District (of Columbia)*." (Italics ours.)

If Congress, in creating these courts of the District of Columbia (which are local, *sui generis* and sit only within the territorial confines of the District) acted *even partially* as the *O'Donoghue* case held) under Article 3 of the Constitution, then *a fortiori* (it seems to us) Congress, in attempting to vest jurisdiction in the far flung constitutional District Courts in all forty-eight of the States and even beyond, must be deemed to have acted *exclusively* under Article 3, Section 2, of the Constitution. We can draw no other rational conclusion from the quoted language of Mr. Justice Sutherland in the O'Donoghue case.

Germane in this connection are the words of Chief Justice Taft in *Postum Cereal Co.* v. *California Fig Nut Company*, 272 U. S. 693, 700:

> "The distinction between the jurisdiction of this Court, which is confined to the hearing and decision of cases in the constitutional sense, and that of administrative action and decision, power for which may be conferred upon courts of the District, is shown in the case of *Keller* v. *Potomac Electric Company*, 261 U. S. 428, 440, 442, 443. There it is pointed out that, while Congress in its constitutional exercise of exclusive legislation over the District may clothe the courts of the [fol. 25] District not only with the jurisdiction and powers of the federal courts in the several States but also with such authority as a State might confer on her courts, *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, 225, 226, and so may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this Court or any federal court established under Article III of the Constitution."

Said Judge Conger, at the end of his opinion in *Behlert* v. *James Foundation*, 60 F. Supp. 706, 709:

> "I am convinced that while Congress, under Article I, Section 8, Clause 17 of the Constitution, may provide jurisdiction to the Courts of the District of Columbia beyond that prescribed by Article III, Section 2 of the Constitution, it may not do so with this Court or any Federal Court established under Article III, Section 2 of the Constitution."

See, also, the language of Judge Paul, in *Willis* v. *Dennis*, 72 F. Supp. 853, 854-855; the language of Judge Coleman in *Feeley* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663, 665-666; and the language of Judge Waring, in *Wilson* v. *Guggenheim*, 70 F. Supp. 417, 419, as to Article 1, Section 8, of the Constitution, which was as follows:

> "* * * But it is quite apparent from the language of the Constitution itself that it was intended to give to the Congress the right to legislate regarding matters within the territory to be ceded * * * Nowhere does it appear except by the most strained of constructions that this was intended to give to Congress the right to legislate in regard to the courts which had been authorized and circumscribed by Article 1, Section 3,* [fol. 26] hereinabove referred to, and which lay outside of this territory."

We are in full accord with these expressions.

Our conclusion is that Congress, in enacting the Act of April 20, 1940, did proceed under Article 3, Section 2, of the Constitution, defining the judicial power of the United States, and that the Act is therefore unconstitutional. We further conclude that any attempt by Congress to proceed here under Article 1, Section 8, of the Constitution, giving Congress exclusive legislative power over the District of Columbia, would likewise lack validity. Article 1, Section 8, of the Constitution is not to be interpreted and applied as if it were an isolated provision standing alone and apart from the other provisions in that great document; rather is it conditioned by, and to be interpreted in the light of, companion articles. Article 1, Section 8 is thus limited by Article 3, Section 2. These two articles must be construed together so as to harmonize the two and give meaning to each; one article cannot be interpreted to flout what appears to be the clear meaning of the other. Congress, therefore, cannot, extend beyond the constitutional limits the jurisdiction of the United States District Courts under the guise of exercising its legislative prerogative that is limited to the District of Columbia.

Counsel for appellant have cited a number of cases in which the District of Columbia has been held to be a

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* This reference should be Article 3, Section 2.

"State" within the meaning of various provisions of the federal Constitution other than Article 3, Section 2. We do not find these cases helpful in deciding the instant case. This same argument was made in the *Hepburn* case, wherein [fol. 27] Chief Justice Marshall, 2 Cranch at page 453, tersely observed:

> "Other passages from the constitution have been cited by the plaintiffs, to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

"Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution." *Hodgson & Thompson* v. *Bowerbank*, 5 Cranch 303. We must recognize this stern admonition of Chief Justice Marshall, and we accordingly hold that the Act of April 20, 1940, is unconstitutional.

For the reasons aforesaid, the judgment of the District Court dismissing appellant's complaint must be affirmed.

Affirmed.

PARKER, Circuit Judge, dissenting:

I cannot concur in the decision that the Act of Congress conferring jurisdiction on the District Courts of the United States of suits between citizens of the District of Columbia and citizens of the several states is violative of constitutional provisions or transcends the power of Congress under the Constitution. The securing of justice for its people is one of the first duties of government. With respect to domestic matters this duty is discharged through the maintenance of domestic courts; where justice as against citizens of other countries is sought, the citizens *is* not left to the [fol. 28] mercy of foreign courts but may call upon his country to protect him through its diplomatic service. Under the dual sovereignty of our federal union, the courts of each of the states furnish a foreign jurisdiction so far as the citizens of other states are concerned, for every state court is the agency of a quasi sovereign power to which citizens of the other states of the Union owe no allegiance and over which they have no control. The states, however, as members of the Union, are denied the power of inde-

pendent nations to pursue justice in behalf of their citizens through diplomatic channels against citizens of other states; and, in lieu of this, the Constitution provides courts of the federal government, the government of all the people of the country, to administer justice in cases where citizens of different states are involved, so that neither party may be required to seek justice from the state of his adversary. This reasoning I understand to lie at the basis of the jurisdiction of the federal courts in diversity cases; and, while I do not think that the District of Columbia is a state within the diversity clause of Art. III of the Constitution, I cannot believe that the citizens of the capital city of the Republic have been left in such position by the Constitution that they cannot be afforded the protection with respect to this fundamental matter that is given all other citizens.*

[fol. 29] It is well settled that the District of Columbia is not a state within the meaning of the Constitution; and, if the power of Congress to vest jurisdiction in the federal courts were limited to that which may be exercised under Art. III, I would think the legislation here involved to be beyond its power. It is equally well settled, however, that Art. III does not express the full authority of Congress

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* The question involved is not a theoretical one, but one of great practical significance. To deny to a citizen of the District the right to resort to the federal courts, means that he must seek justice in a court of the state of his adversary, where he will find, in many of the states, that trial by jury has been stripped of many of its safeguards, and the judge has been denied the common law powers necessary to the proper administration of justice. See article by Judge Merrill E. Otis, *Journal of American Judicature Society*, vol. 21, p. 105 et seq. To require a non resident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury, without power in the presiding judge to counteract the appeals to prejudice of local counsel, it is also to deny to him the sort of trial by jury which as a citizen of the United States he is entitled to have in the federal courts. *Herron* v. *Son. Pac. Ry. Co.*, 283 U. S. 91, 95; *Patton* v. *U. S.*, 281 U. S. 276, 288; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13-16; *U. S.* v. *Philadelphia & R. R. Co.*, 123 U. S. 113, 114; *U. S.* v. *Fourteen Packages of Pins*, 1 Gilp. 235, 25 Fed. Cas. (No. 15, 151) 1182, 1189.

to create courts." *Ex Parte Bakelite Corporation*, 279 U. S. 438, 449. Congress may vest judicial power in courts to hear litigation affecting citizens of the District of Columbia; and I see nothing in the Constitution to forbid such power being vested in the ordinary federal courts created under Art. III. It has been decided that Congress may vest in courts created under Art. 1 sec. 8 the jurisdiction which it is authorized to confer under Art. III. *O'Donoghue v. United States*, 289 U. S. 516. On the same principle it may vest in courts created under Art. III the judicial power, but of course not the non-judicial power, which it is authorized to confer by Art. 1 sec. 8.

No one would dispute, I think, the power of Congress to create courts to hear any litigation to which a citizen of the District of Columbia is a party. Such power is inherent in the full power of sovereignty exercised over the District, a power which combines that of the general government and the states. *O'Donoghue* v. *United States, supra; Stantenburgh* v. *Hennick*, 129 U. S. 141, 147. It seems equally clear that Congress could authorize such courts to sit and their process to run anywhere in the country. If this can be done, I see no reason why Congress cannot combine the jurisdiction of such courts with that of the ordinary federal courts already created under Art. III. Where the question of the validity of an act of Congress is raised, the question is [fol. 30] not under what provision of the Constitution it has purported to act, but whether, when all provisions of the Constitution are considered, it has transcended the total of the powers granted it by the people. In this case I do not think it can be said that Congress has transcended its powers; and I say this without reference to the well settled doctrine that an act of Congress may not be declared unconstitutional unless its violation of constitutional provisions is established beyond reasonable doubt.

It is suggested that the power to create courts for citizens of the District is limited geographically to the District; but there is nothing in the Constitution from which any such limitation can be spelled out. It should be noted that the power of Congress is not merely to exercise exclusive legislation over the District, but also to make all laws necessary and proper to that end, which certainly would seem to authorize legislation necessary to secure a proper administration of justice for its citizens. See Art. I sec. 8 (17) and (18). The power to legislate for the citizens of the District,

as we have seen, is full legislative power, combining that possessed by Congress and a state legislature and, except for express limitations contained in the Constitution itself, analogous to the full power possessed by the Parliament of England. Certainly, if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts (*In re Ross*, 140 U. S. 453) or the United States Court for China (Ex Parte Bakelite Corp., 279 U. S. 438, 451), there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District, for the power to legislate for their [fol. 31] protection in this regard is just as clearly given as the power to legislate for citizens of the country resident or trading abroad. That the protection is exercised in this rather than in a foreign country would seem to support rather than to negative the right to exercise it.

The fact that Congress may not confer on the District Courts jurisdiction of suits in which citizens of states are involved unless there is diversity of citizenship, furnishes no argument that the power does not exist with respect to suits involving citizens of the District; for the only authority in the former case to vest judicial power in the courts arises under the provision relating to diversity of citizenship, whereas in the latter case full power is granted to legislate for citizens of the District. That the diversity clause is construed so as not to apply to citizens of the District is an added reason for construing the provisions of Art. I sec. 8 as authorizing legislation which would make the federal courts available to them; for it is not reasonable to suppose that the founders of our government intended that it be powerless to afford the protection of its own judiciary to citizens of its capital city.

More than a century ago Chief Justice Marshall pointed out what he thought was the extraordinary situation that, under the Judiciary Act, the District Courts of the United States, which were open to aliens and to citizens of every state in the Union, should be closed to citizens of the nation's capital. Since then the capital has become a large and flourishing city with citizens who trade and travel and do business throughout the Union. The right to invoke the jurisdiction of the only sovereignty to which they owe

allegiance and to which they can look for protection has become an increasingly important one and has at length [fols. 32-33] been recognized by Congress in the passage of legislation, which opens the federal courts to them on the same conditions that these courts are open to other citizens of the Republic. For the reasons which I have endeavored to set forth, I do not think this salutary legislation beyond the power of Congress, when the provisions of Art. I sec. 8, as well as the Third Article of the Constitution are considered.

[fol. 34] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

JUDGMENT—December 31, 1947

Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

I dissent:

John J. Parker, Senior Circuit Judge.

[fol. 35] In United States Circuit Court of Appeals

January 23, 1948, petition of appellant for a stay of mandate is filed.

Order Staying Mandate—Filed January 26, 1948

Upon the Motion of the appellant, by its attorney, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 24, 1948.

John J. Parker, Senior Circuit Judge.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] Supreme Court of the United States

Order Allowing Certiorari—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. In view of the Act of August 24, 1937, 28 U. S. C. Sec. 401, the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Act of April 20, 1940 (c. 117, 54 Stat. 143), is drawn in question in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 429

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, *Petitioner*,

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, a corporation of the State of Virginia

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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IN THE

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OCTOBER TERM, 1947.

No. .....

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v.

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---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petitioner, National Mutual Insurance Company of the District of Columbia, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court for the District of Maryland dismissing petitioner's complaint for lack of jurisdiction.

Opinions Below.

The majority and dissenting opinions of the circuit of appeals (R. 10-22) are reported at F. 2d . No opinion was filed by the district court.

Jurisdiction.

The judgment of the circuit court of appeals was entered December 31, 1947 (R. 22). The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Whether the Act of April 20, 1940 amending Section 24, (1) (b) of the Judicial Code to give the District Courts of the United States original jurisdiction of suits of a civil nature between citizens of the several states and citizens of the District of Columbia is constitutional.

Constitutional Provisions and Statute Invovlved.

Section 24 of the Judicial Code (28 USC 41), as amended by the Act of April 20, 1940 c. 117, 54 Stat. 143, provides in pertinent part:

> "The District Courts shall have original jurisdiction as follows:
>
> (1) United States as plaintiff; civil suits at common law or in equity. First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * (b) is between citizens of different States or *citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory.*"[1]

The Constitution of the United States in pertinent part provides: Article I, Section 8,

> "The Congress shall have power * * * to exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * *

[1] The italicized portions were added by the amending statute of April 20, 1940.

Article III, Section 1

> "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Article III, Section 2

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT.

Petitioner, a corporation of the District of Columbia, and respondent, a corporation of the State of Virginia (R. 1, 6) entered into a contract of insurance on September 30, 1942 (R. 1). Thereafter, on August 12, 1947, petitioner, the insurer, filed a civil suit against respondent in the District Court for the District of Maryland to recover from the respondent money due and owing under the insurance contract. (R. 1-5).

Petitioner asserted in its complaint that the district court had jurisdiction of the cause under Section 24 (1) of the Judicial Code (R. 1). On motion of the respondent (R. 5), the district court, on September 18, 1947, entered an order (R. 6) dismissing the complaint on the ground that the

Act of April 20, 1940, "is unconstitutional to the extent that it amended Section 41 (1) (b) of Title 28 U. S. C. A. [Section 24 (1) (b) of the Judicial Code] by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different states". Thus the district court in effect held that Congress could not empower it to entertain suits between citizens of the District of Columbia and citizens of the States.

On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was affirmed, Senior Circuit Judge Parker dissenting. The majority of the court below held (R. 10-18): (1) that the District of Columbia was not a state proper in the sense intended by Article III of the Constitution and that, therefore, Congress could not confer upon federal courts established pursuant to that Article jurisdiction over suits between citizens of the states proper and citizens of the District of Columbia, and; (2) that the Congressional authority under Article I, Section 8, while plenary and far reaching, nevertheless was limited, insofar as the creation of judicial authority was concerned, to the establishment of courts to sit territorially within the District of Columbia. The Senior Circuit Justice, dissenting (R. 18-22), was of the view that since a prime requisite of our system of government was the assurance of equal justice to all, the Constitution should not and need not be so interpreted as to fail to afford to a large segment of our population equal access to courts created thereunder. Judge Parker was of the opinion that the authority conferred upon Congress by Article I, Section 8, empowered it to create courts to sit in or outside of the territorial limits of the District of Columbia to hear causes involving District citizens or, as it did by the Act of April 20, 1940, to combine such jurisdiction with that of the ordinary federal courts already created by Congress under Article III of the Constitution.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In affirming the judgment of the district court.

2. In holding that the Act of April 20, 1940, was unconstitutional insofar as it amended Section 24 (1)(b) of the Judicial Code to give the District Courts original jurisdiction of suits between citizens of the District of Columbia and citizens of the States proper.

REASONS FOR GRANTING THE WRIT.

This case presents for the first time in this Court the question of the constitutionality of the Act of April 20, 1940, insofar as it amended Section 24 (1) (b) of the Judicial Code (supra p. 2) to give the federal courts original jurisdiction, on the basis of diversity of citizenship, where one party is a citizen of the District of Columbia.

As of the writing of this petition, the question has been decided by two Circuit Courts of Appeal, the court below and the Seventh Circuit,[2] by ten District Courts,[3] and is pending before the Third Circuit Court of Appeals.[4] Both the Fourth and Seventh Circuits held the statute unconstitutional over vigorous dissents, in both cases, of the

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[2] *Central States Cooperatives, Inc. v. Watson Bros. Transportation Company, Inc.*, — F. 2d — (decided December 12, 1947), reversing — F. Supp. — (N. D. Ill.)

[3] Constitutionality upheld: *Duze* v. *Wooley*, 72 F. Supp. 422 (D. Hawaii); *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Cal.); *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.). See also footnote 2 *supra*.

Constitutionality denied: *Willis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Wilson* v. *Guggenheim*, 70 Supp. 417 (E. D. S. C.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Behlert* v. *James Foundation of New York*, 60 F. Supp. 706 (S. D. N. Y.); *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa.).

[4] *Francis Van Sant* v. *American Express Co.*, No. 9044 (CCA 3) now pending on second reargument.

Senior Circuit judges. The District Courts have divided on the question. Thus the lower courts "have experienced a 'field day' in constitutional erudition".[5] Additionally, there are numerous articles in legal periodicals on the question, almost all of which have spoken quite strongly in favor of the constitutionality of the statute.[6]

In this posture of divided authority, and particularly since controlling appellate decisions have held that Congress lacks constitutional authority to provide judicial forums for citizens of the District of Columbia on an equal and like basis as those provided for citizens of the States proper, the substantial importance of the question and the need for this Court to assume jurisdiction to decide the issue on writ of certiorari seems self-apparent. This conclusion would appear buttressed by the fact that the Solicitor General of the United States has advised that he will, upon the filing of this petition, file a motion for leave to intervene in support of this petition for a writ of certiorari.

Perhaps the significance of the question petitioner seeks this Court finally to resolve is best gained by reference to the exhaustive treatment of the problem in the majority and dissenting opinions below and of the Seventh Circuit. In any event, petitioner will briefly review what it deems to be the more important facets of the problem.

To implement Article III of the Constitution, the first Congress enacted the First Judiciary Act creating inferior federal courts and giving them jurisdiction, *inter alia*, of civil suits between citizens of different states or between citizens of the states and foreign citizens. Act of September 24, 1789; 1 Stat. 73, 78. In a decision rendered at one of its earliest terms, this Court, speaking through Chief Justice Marshall *held* that citizens of the District of Columbia were not citizens of a state within the meaning of the

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[5] *Central States* case, footnote 2, *supra*.

[6] See e.g. 29 Geo. L. J. 193; 5 La. L. Rev. 478; 21 Texas L. Rev. 83; 21 Tulane L. Rev. 171; 11 Geo. Wash. L. Rev. 258. *Cf* XV D. C. Bar Asso. J. 55; 55 Yale L. J. 600.

First Judiciary Act and that, consequently, the federal courts had no diversity jurisdiction of a civil suit between a citizen of the District and a citizen of a state proper. *Hepburn v. Ellzey*, 2 Cranch 445. The foregoing decision did not consider various possible constitutional bases for further Congressional action to empower federal courts generally to entertain suits between citizens of the District and citizens of the states proper.

Federal jurisdiction based on diversity of citizenship remained static until 1940 when Congress realized that, under existing law, large segments of our population were precluded from seeking relief in the federal courts even though the same privilege was open even to aliens. To alleviate the situation of well over a million citizens of the District of Columbia and millions of citizens of the territories and to give them access to the federal courts generally on an equal footing with citizens of the states proper and with aliens, Congress passed the Act of April 20, 1940, amending Section 24 (1) (b) of the Judicial Code.

In its report accompanying the bill which became the amending act, the Judiciary Committee of the House of Representatives, after stating the purpose of the bill and reciting at some length the reasons and authority from which it concluded that "there appears to be no constitutional objection to this bill", stated:

> "It is submitted that H. R. 8822 is a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories. It should be borne in mind that the citizens of the District of Columbia and of the Territories are citizens of the United States. They are subject to the burdens and obligations of such citizenship just as are the citizens of the 48 States. Simple justice requires that they should share the rights and privileges of such citizenship insofar as Congress has authority to confer it upon them. This is the real intent of the Constitution".

[7] H. Rep. 1756, 76th Cong. 3d Sess., accompanying H. R. 8822.

Without full consideration of the problem by this Court it is questionable whether a solemn Act of Congress so designed should be deemed abortive where there is substantial and well-considered legislative, judicial and other authority legitimizing the measure. The consequences are, of course, apparent. Citizens of the District of Columbia, as well as those of the territories, although citizens and taxpayers of the United States and entitled to equal treatment under our laws, cannot in the federal courts of general jurisdiction seek relief against citizens of the states proper or even against aliens. They can only hope for such treatment as they may receive in the local courts of the several states of which their opponents are citizens. Thus, the constitutional motive for the creation of an independent federal judiciary to decide controversies between citizens of different communities unprejudiced by local influences, sentiments and bias is frustrated so far as millions of Americans are concerned even though that same impartial justice is available even to aliens in our midst. See *Hepburn* v. *Ellzey*, 2 Cranch at 453.

Petitioner submits that there is substantial and persuasive constitutional authority to avoid such unfair and impractical consequences. While, if given the opportunity by a grant of certiorari, petitioner will present the constitutional authority for the Act of April 20, 1940, in greater detail, briefly petitioner suggests that Congress was empowered to enact such legislation by the combined authority of Article I, Section 8, Article III, Section 1 and the inherent philosophy of our system of government. We start with the premises that ours is a system of equal justice under law and that our government, like any democratic government, must afford its citizens adequate facilities for resolution of their disputes. The Constitution, in Article III, Section 1, provides for the creation of superior and inferior courts for these purposes. While the inferior courts thus authorized are jurisdictionally limited by the

terms of Article III, Section 2,[8] nevertheless the constitution also provides in Article I, Section 8, that Congress should have plenary authority over the area established as the seat of government including the power "to make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution." It is now established, of course, that the latter provision authorized, at least, the creation of a system of courts to sit in and for the District of Columbia. But since in legislating for the District of Columbia Congress acts not as a local legislature but under its national power, its power *qua* District of Columbia operates throughout the United States. See *Cohen* v. *Virginia* 6 Wheat 264, 424-429. Consequently, as a necessary incident to its authority to legislate for the District and its population, Congress could create courts to sit anywhere to hear causes involving District citizens.

The majority below apparently believed that insofar as Congress has authority under the Constitution to establish courts for the District, that power is limited geographically to the District. But no such geographical limitation is expressed in Article I, Section 8. See *Cohen* v. *Virginia*, *supra*. And since Congress has found as a fact that it is appropriate and necessary to afford to citizens of the District access to Federal Courts outside of the District in order to assure them of the protection of our laws, there is no basis for reading into Article I, Section 8 any such geographical limitation. Congress could, therefore, under Article I, Section 8, establish independent tribunals outside of the District with such jurisdiction as was conferred by the Act of April 20, 1940. Nor is there any apparent

[8] The court below rendered its decision on the premise that the clause in Article III, Section 2 reading "between citizens of different States" employed the word "States" in its political sense. However, it is arguable that the word taken in context was intended in a geographic sense and that *Hepburn* v. *Ellzey* *supra* pp. 6-7, to the extent that it casts an inference to the contrary, should be reexamined.

reason why instead of creating new courts outside the District for such purposes, the same strictly judicial authority could not be conferred upon such federal courts as have already been created under Article III of the Constitution.

CONCLUSION.

The question presented is patently one of grave importance to masses of American citizens. The decision below —in conflict with other decisions—adopts an unnecessarily restrictive approach to the constitutional authority of Congress to provide adequate judicial forums for citizens of the District of Columbia. Only this Court can finally resolve the constitutional question. We therefore respectfully submit that this petition for a writ of certiorari should be granted.

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March 1948

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 29.

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, *Petitioner*

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A Corporation of the STATE OF VIRGINIA.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The majority (R. 10-18) and dissenting (R. 18-22) opinions of the circuit court of appeals are reported at 165 F. 2d 531. No opinion was filed by the district court.

JURISDICTION

The judgment of the circuit court of appeals was entered December 31, 1947 (R. 22). The petition for a writ of certiorari was filed March 3, 1948, and granted March 29, 1948 (R. 23). The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Congress could, under either Article I, Section 8 or Article III, Section 2 of the Constitution, vest district courts generally with original jurisdiction of suits of a civil nature between citizens of the several states proper and citizens of the District of Columbia, and whether the Act of April 20, 1940, so amending Section 24 (1) (b) of the Judicial Code is constitutional.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 24 (1) (b) of the Judicial Code (28 U.S.C. § 41 (1) (b), 1946 ed.), as amended by the Act of April 20, 1940 (c. 117, 54 Stat. 143), provides in pertinent part:

> "The District Courts shall have original jurisdiction as follows:
>
> * * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different States, *or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory,* * * * [1]

[1] The italicized portions were added by the amending statute of April 20, 1940. The Judicial Code as recodified, effective September 1, 1948, now provides as follows:

> § 1332. Diversity of citizenship; amount in controversy
>
> (a) The district courts shall have original jurisdiction of of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:
>
> (1) Citizens of different States;
>
> (2) Citizens of a State, and foreign states or citizens or subjects thereof;
>
> (3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

The Constitution of the United States in pertinent part provides:

Article I, Section 8

"The Congress shall have power . . .

"[Cl. 17.] To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be . . .

[Cl. 18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof."

Article III, Section 1:

"The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Article III, Section 2:

"The judicial Power shall extend to all Cases, in law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting

---

[1] (continued.)

(b) The word "States," as used in this section, includes the Territories and the District of Columbia."

However, the foregoing altgration would not appear materially to affect resoiuton of the issues presented in this cause since the effect of the new language is merely to clarify the 1940 amendment.

Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

STATEMENT.

Petitioner, a corporation of the District of Columbia (R. 1, 6), and respondent, a corporation of the State of Virginia (R. 1, 6), entered into a contract of insurance on September 30, 1942 (R. 1). Thereafter, on August 12, 1947, petitioner, the insurer, filed a civil suit against respondent in the District Court for the District of Maryland to secure reimbursement under the contract in the sum of $10,000 on account of payments petitioner was required to make because of respondent's breach of the insurance contract (R. 1-5).

In its complaint, petitioner asserted that the district court had jurisdiction of the cause under Section 24 (1) of the Judicial Code (R. 1). On respondent's motion (R. 5), the district court dismissed the complaint on September 18, 1947, stating that the Act of April 20, 1940, "is unconstitutional to the extent that it amended Section 41 (1) (b) of Title 28 U.S.C.A.[2] by extending the jurisdiction by the Federal Courts beyond controversies between citizens of different states" (R. 6). Thus the district court held that Congress could not constitutionally empower it to entertain suits between citizens of the District of Columbia and citizens of the several states proper.

On appeal to the Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was affirmed,

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[2] Section 24 (1) (b) of the old Judicial Code, Section 1332 of the new Judicial Code, effective September 1, 1948. See fn. 1, *supra*.

Senior Circuit Judge Parker dissenting.[3] The majority of the court below held (R. 10-18): (1) that since the District of Columbia is not a "state" proper within the meaning of that term as used in Article III, Section 2 of the Constitution, Congress lacked authority under that article—pursuant to which it presumably acted in adopting the 1940 amendment—to vest the district courts with original jurisdiction of suits between citizens of the District and of the states, and (2) that even if Congress were presumed to have acted under the plenary and far reaching power granted by Article I, Section 8 (Cl. 17 and 18), the 1940 amendment was unconstitutional because the congressional power over the District is territorially limited to the District and Congress cannot "extend beyond the constitutional limits the jurisdiction of United States District Courts under the guise of exercising its legislative prerogative that is limited to the District of Columbia" (R. 17).

Judge Parker, the Senior Circuit Judge, dissenting, (R. 18-22) was of the view: (1) that the complete legislative authority of Congress to create courts was not expressed in Article III and that such power, insofar as the District of Columbia was concerned, was granted by Article I, Section 8 (Cl. 17 and 18), and (2) that the authority conferred

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[3] The 1940 Act was also held unconstitutional in *Central States Cooperatives, Inc.* v. *Watson Bros. Transportation Company*, 165 F. 2d 392 (C. C. A. 7) now pending before this court on a petition for a writ of certiorari (No. 43, O. T. 1948); *Wallis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Behlert* v. *James Foundation of New York*, 60 F. Supp. 706 (S. D. N. Y.) and *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa.).

A contrary conclusion was reached in *Duze* v. *Wooley*, 72 F. Supp. 422 (D. Hawaii); *Glaeser* v. *Acacia Mutual Life Assoc.*, 55 F. Supp. 925 (N. D. Cal.); *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.) and by the district court (N. D. Ill.) in the *Central States* case; *supra*.

An appeal involving the same question has not yet been decided by the Third Circuit: *Van Sant* v. *American Express Co.* No. 9044.

upon Congress by Article I, Section 8 (Cl. 17 and 18) empowered it either to create courts to sit in or outside of the territorial limits of the District of Columbia to hear causes involving District citizens, or, as it did by the Act of April 20, 1940, to combine such jurisdiction with that of the ordinary federal courts already created under Article III.

SPECIFICATIONS OF ERRORS TO BE URGED.

The circuit court of appeals erred:

1. In affirming the judgment of the District Court.

2. In holding that the Act of April 20, 1940, was unconstitutional insofar as it amended Section 24 (1) (b) of the Judicial Code to give the federal district courts original jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper.

SUMMARY OF ARGUMENT.

I.

The 1940 amendment of the Judicial Code giving federal district courts generally original jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper is within the authority conferred by the diversity clause of Article III, Section 2 of the Constitution. When the Constitution was adopted, the citizens of what is now the District of Columbia were citizens of the states proper (Maryland and Virginia) and were, therefore, entitled to the assurances of the diversity clause as legislatively implemented. The purpose of the diversity clause was to eliminate possible prejudice against nonresidents in foreign courts by offering them recourse to impartial federal forums. Its language evidences an intention to cover all cases where the parties are residents of different political communities; there is nothing in the constitutional background to support a more limited intent or coverage. Accordingly, since citizens of the District of

Columbia, would be equally affected with citizens of the States proper and with aliens by the evil against which this provision was directed, the District of Columbia must be treated as a "state" for the purposes of the diversity clause.

Hepburn v. *Ellzey*, 2 Cranch 445, merely held that the First Judiciary Act of 1789, conferring upon the circuit courts jurisdiction of cases between citizens of different states, did not authorize jurisdiction of suits between citizens of the District of Columbia and citizens of the states proper. The decision did not construe either Article I or Article III of the Constitution which are here involved. That and others of Chief Justice Marshall's decisions suggest that the limitation found to exist in the First Judiciary Act could be cured by further legislation. Furthermore, the factors which may have led to Chief Justice Marshall's construction of the First Judiciary Act do not support a similar current construction of the diversity clause of Article III of the Constitution, because today the District of Columbia has the vital characteristics of a state proper and it has been held to be a "state" in analagous cases.

Accordingly, the 1940 amendment extending the diversity jurisdiction of federal district courts to suits between citizens of the District and of the states proper does not go beyond the limitations of Article III and, to the extent that *Hepburn* v. *Ellzey* infers the contrary, that decision is in error.

II.

The extension of diversity jurisdiction to citizens of the District is also constitutionally appropriate under Article I, Section 8, (Cl. 17 and 18) giving Congress plenary and far reaching authority to legislate for the District and its citizens and, as a facet of such authority, to create such judicial forums as shall be necessary and proper.

The legislative power over the affairs of the District granted by Article I, Section 8 is not so limited, expressly or impliedly, as to be operative only within the territorial boundaries of the District; the power can be exercised as a national power throughout the United States. Accordingly, Congress could, thereunder, create courts to sit in or outside the District to hear the causes of its citizens.

The federal judicial power conferred by Article III is supplemented by the power to vest judicial authority implicit in Article I, Section 8 (Cl. 17 and 18). Moreover, decisions of this court show that so-called constitutional courts created under Article III can have non-Article III judicial functions conferred upon them. Therefore, it was entirely proper for Congress to merge in the federal district courts generally the jurisdiction conferred under Article III with jurisdiction conferred as an exercise of the legislative authority under Article I, Section 8, as was accomplished by the 1940 Amendment of the Judicial Code.

ARGUMENT.

Introduction.

One hundred and fourty-four years ago, Chief Justice Marshall held that the First Judiciary Act[1] had not given the federal courts (circuit courts) generally jurisdiction of suits between citizens of the District of Columbia and of the states proper and that although this was "extraordinary" it was a subject "for *legislative*, not for judicial consideration". *Hepburn* v. *Ellzey*, 2 Cranch 445, 453 (1804). (Italics supplied.) By the Act of April 20, 1940, Congress corrected this previous legislative omission and gave citizens of the District equal access to the federal courts with citizens of the states proper and aliens. Now some courts, including that below, have held that the discrimination noted by Marshall could not be legislatively removed because of the absence of constitutional authority.

Accordingly, we have to determine whether the Act of April 20, 1940, is proscribed by the Constitution, and for this purpose petitioner assumes that no inquiry is required as to whether federal diversity jurisdiction is desirable, necessary or practical. While there have been spirited attacks upon the wisdom of the creation of such diversity jurisdiction,[6] there are at least equally tenable arguments in its behalf.[7] In any event, as Chief Justice Marshall stated in the *Ellzey* case, *supra*, the matter is one for legislative and not judicial consideration, and would now appear settled by reason of the action of the Seventy-Sixth Congress in affirming and enlarging such federal jurisdiction.

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[5] This question and the several cases decided since the enactment of the 1940 Amendment have been the subject of extensive and varied law periodical comment. See e. g. *Dykes* and *Keeffe*. *The 1940 Amendment to the Diversity of Citizenship Clause* (1946), 21 Tulane L. Rev. 171; Weston, *District of Columbia Citizens Denied Diversity Jurisdiction* (1948), 16 Geo. Wash. L. Rev. 381; Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction* (1948) 15 J. B. A. Dist. Col. 55. See also notes in 29 Geo. L. J. 193 (1940); 5 La. L. Rev. 478 (1943); 11 Geo. Wash. L. Rev. 258 (1943); 21 Tex. L. Rev. 83 (1942); 55 Yale L. J. 600 (1946); 46 Col. L. Rev. 125 (1946); 61 Harv. L. Rev. 885 (1948); 34 Va. L. Rev. 91 (1948); 22 Notre Dame L. Rev. 232 (1947); 36 Geo. L. J. 251 (1948); 96 U. of Pa. L. Rev. 440 (1948); 46 Mich. Rev. 557. (1948).

[6] See e. g. Frankfurter, *Distribution of Judicial Power Between United States and State Courts* (1928), 13 Corn. L. Q. 499, 520 *et seq.*; Friendly, *Historic Basis of Diversity Jurisdiction* (1928), 41 Harv. L. Rev. 483.

[7] See e. g. Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States* (1933), 19 A. B. A. J. 71, 149, 265; Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship* (1929), 78 U. of Pa. L. Rev. 179; Weston, *op. cit. supra* fn. 5.

I.

FEDERAL JURISDICTION OF SUITS BETWEEN CITIZENS OF THE DISTRICT AND OF THE STATES PROPER IS AUTHORIZED BY THE DIVERSITY CLAUSE OF ARTICLE III, SECTION 2.

A. The Citizens of the District are Constitutionally entitled to the Benefits of Diversity Jurisdiction Because They Were Citizens of States When the Constitution Was Adopted.

It would seem pertinent to evaluate the terms of Article III, Section 2 in the light of the political pattern at the date of the adoption of the Constitution. The then Union was made up exclusively of thirteen states and the citizens of what later became the District of Columbia were citizens of two of them, Maryland and Virginia, and thus entitled to the advantages and benefits intended by the diversity clause of Article III, Section 2 as legislatively implemented. The same was true in 1789 when the First Judiciary Act was passed conferring upon the circuit courts jurisdiction of the type contemplated by the diversity clause. See fn. 20 *infra*. Accordingly, unless some specific and compelling constitutional direction required it, the constitutional assurances of the diversity clause should not be taken from the citizens of that area. As this Court said in *Downes* v. *Bidwell*, 182 U. S. 244, 260-261, discussing its previous decision in the *Loughborough* case, *infra*, p. 19:

> "There could be no doubt as to the correctness of this conclusion [that a direct federal tax could be made operative within the District], so far, at least, as it applied to the District of Columbia. This District had been a part of the States of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution

could not be dissolved, without at least the consent of the Federal and State Governments to a formal separation. *The mere cession of the District of Columbia to the Federal Government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution.* Neither party had ever consented to that construction of the cession. If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District what it could not do directly. The District still remained a part of the United States, protected by the Constitution. Indeed, it would have been a fanciful construction to hold that territory which had been once a part of the United States ceased to be such by being ceded directly to the Federal Government". (Brackets and italics supplied.)

And to the same effect is the decision in *O'Donoghue v. United States*, 289 U. S. 516, 540 where this Court said:

"It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under, and vested with the judicial power conferred by, Art. 3. We think it is not reasonable to assume that the cession stripped them of these rights and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union."

B. The District Is a State Within the Meaning of Article III, Section 2.

1. The purpose of the diversity clause embraces the District.

"Probably nothing in the whole debates [of the Constitutional convention] is more astonishing than the slight discussion reported by Madison as given to the Judiciary Article of the Report of the Committee of Detail of August 6, [1787]."[8] Little or no contemporaneous discussion of the scope or application of that article has been reported. One of the few statements of the purpose of the diversity clause was that of Hamilton to the effect that:

> "The reasonableness of the agency of the National Court in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his cause, or in any cause in respect to which he had the least interest or bias. This principle had no inconsiderable weight in designated the Federal Courts as the proper tribunals for the determination of controversies between different States and their citizens."[9]

That the diversity clause was intended to offer to all non-residents of a particular state full opportunity for the settlement of disputes removed from local prejudice and influence is confirmed by the remarks by Chief Justice Marshall in *Bank of the United States* v. *Deveaux*, 5 Cranch 61, 87, in which the Court held that the jurisdiction granted by the diversty clause was available to corporate as well as to individual parties because:

> "However true the fact may be, that the tribunals of the states will administer justice as impartially as

[8] Warren, *The Making of the Constitution*, (1928), p. 531. See also Farrand, *Framing of the Constitution* (1913), p. 154. For a detailed history of the adoption of the diversity clause see Friendly *op. cit. supra* fn. 6.

[9] *The Federalist* (No. 88). To same effect see report of Madison's remarks in the Virginia ratification convention. 2 Elliot, *Debates* (1828), p. 391.

those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states. Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right; and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals."[10]

No more informative explanation of the scope of the diversity clause has been found in the statements of the founders or in contemporaneous reports. However, it is apparent that the objective and policy of that clause, as described by Hamilton and Marshall, are as apposite to suits between citizens of the District of Columbia and of the states proper as to suits between citizens of different states proper. There is no reason to suppose that a citizen of the District of Columbia would be less apprehensive in the local courts of Mississippi than would a citizen of New York. The objective of the constitutional provision was to lessen the impact upon *all* litigating on their adver-

[10] Cf. the remarks of Johnson, J., in *Polk* v. *Wendell*, 5 Wheat. 292, 301 to the effect that the "sole object" of diversity jurisdiction "is to secure to *all* the administration of justice, upon the same principles on which it is administered between citizens of the same state." (Italics supplied.)

saries' home grounds by offering a federal system of umpires removed so far as possible from potentially partial local influences." The broad reach of the diversity clause is apparent from the inclusion of aliens, thereby reflecting an intention to comprehend all cases involving the citizens of more than a single political community. See *Polk* v. *Wendell*, *supra*, fn. 10. Therefore, in the absence of affirmative evidence of a more restrictive constitutional intention, the diversity clause ought—in keeping with its objective—to be applied as Congress has seen fit to apply it in the 1940 Amendment, so as to offer its protection to citizens of the District as well as those of the states proper. This Court has said that "* * * the practical construction of the Constitution by Congress * * * is entitled to great consideration, especially in the absence of anything adverse to it in the discussions of the Convention which framed, and of the Conventions which ratified the Constitution." *Veazie Bank* v. *Fenno*, 8 Wall 533, 544.

The construction of Article III, Section 2 adopted by Congress in enacting the 1940 Amendment cannot be discarded except on the theory that the District of Columbia is excepted from the reach of the diversity clause by reason of its not having been specifically mentioned therein. But the propriety of such an arbitrary application of the maxim *expressio unius est exclusio alterius* would appear negated by the clear intent of the framers to include all categories of non-residents. Indeed, it is difficult to believe that had the specific problem here raised been presented to the framers they would have provided otherwise, since they expressly opened the federal judicial forum even to aliens,[12] and, as this Court held by judicial construction in the *Deveaux* case, *supra*, they did the same for corporate bodies. Certainly the opportunity of an im-

[12] Diversity jurisdiction "is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias". Frankfurter, *op. cit. supra*, fn. 6, 21 Cornell L. Q. at 520.

[13] *Sere* v. *Pitot*, 6 Cranch 332.

partial federal justice offered indiscriminately to citizens in general, to aliens and to corporate bodies was not intended to be withheld from citizens who happened to reside at the seat of government.

2. The 1940 Amendment expressly providing that diversity jurisdiction shall be available to citizens of the District of Columbia was first suggested by Hepburn v. Ellzey.

The diversity problem as applied to citizens of the District of Columbia was first considered by this Court in *Hepburn v. Ellzey*, 2 Cranch 445. The Court there held that the jurisdiction conferred upon the circuit courts by the First Judiciary Act of suits between "a citizen of the state where the suit is brought, and a citizen of another state" did not comprehend suits between citizens of the District and of the states proper.[13] 2 Cranch at 452. However, that decision was merely one of statutory construction and did not, as sometimes suggested,[14] announce a rule of constitutional law. It decided no more than that the First Judiciary Act of 1789 did not grant such jurisdiction.[15] This is apparent from Chief Justice Marshall's approach in the *Deveaux* case, *supra*. There he concluded that a corporation was in the class to which the diversity clause of the Constitution applied. While the Chief Jus-

[13] In *New Orleans v. Winters*, 1 Wheat. 91, the question arose in regard to the territory of Louisiana which was held to be in the same category as the District of Columbia.

[14] See e. g. *Hooe v. Jamieson*, 166 U. S. 395, 396-397; *O'Donoghue v. United States*, 289 U. S. 516, 543.

[15] See Dykes and Keeffe, *op. cit. supra* fn. 5, 21 Tulane L. J. at 176-177. Traditionally, constitutional language is given a broader or more flexible meaning than the same language in legislation, because "the Constitution has a broader purpose than a statute and is intended to last for a much longer time, [and accordingly] its wording should possess a flexibility which is not needed in a statute." Chafee, *Federal Interpleader Since the Act of 1936* (1940), 49 Yale L. J. 377, 395. See also *Lamar v. United States*, 240 U. S. 60, 65.

tice conceded that a corporation "is not a citizen",[16] he nevertheless felt that the purpose and spirit of the diversity of citizenship clause was dispositive. A contrary conclusion would have been required had Marshall chosen to govern his decision by the maxim *expressio unius est exclusio alterius*. Thus it seems clear that had he intended in *Ellzey* to do more than construe the First Judiciary Act and to enunciate constitutional doctrine, he would have concluded, as in *Deveaux*, that technical rules of construction aside, the objectives and purposes of the diversity clause were as applicable to citizens of the District of Columbia as they were to corporate bodies (see discussion *supra*, pp. 13-14) and that there was nothing in the historical constitutional materials to compel their exclusion from the benefits of that provision.

That the *Ellzey* decision was confined to the construction of the First Judiciary Act is also demonstrated by the fact that Congress was actually there invited to take remedial action in the following words (2 Cranch at p. 453):

> "It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for *legislative*, not for judicial consideration." (Italics supplied.)

The 1940 amendment is the belated acceptance of that invitation.[17]

Even assuming that Chief Justice Marshall intended to reflect upon the lack of constitutional authority to extend diversity jurisdiction to suits between citizens of the District and of the state proper, there is basis for current re-

[16] 2 Cranch at 86-87.

[17] H. Rep. No. 1756, 76th Cong., 2d Sess. quoted *infra* p. 21.

examination of this conclusion.[15] As one writer has pointed out in some detail,[16] when *Ellzey* was decided, and previously when the First Judiciary Act was enacted, the national capital was just coming into being and had not yet acquired any definitive political pattern.[17] In 1801 it was a small community of about 5,000, including slaves, foreigners and transients and was governed under temporary legislation. Thus when Marshall was called upon to determine whether the District was to be treated as a "state" for diversity purposes, it was a small relatively unimportant political subdivision without, as yet, any permanent status or government. In contrast, the District today is one of the larger metropolitan communities of

[15] The *Ellzey* decision has generally been followed without examination of the reasons behind it. See e. g. *Hooe* v. *Jamieson*, 166 U. S. 395; *Cameron* v. *Hodges*, 127 U. S. 322; *Barney* v. *Baltimore*, 6 Wall. 280.

[16] Weston, *op. cit. supra* fn. 5, 16 Geo. Wash. L. Rev. at 286-387.

[17] When the Constitution was signed (September 17, 1787) and became effective by ratification of the ninth state (June 21, 1788) no plans had yet been carried out for the establishment of a seat of government as provided in Article I, Section 8 (Clause 17). Nor had this been accomplished when the first Congress met (April 30, 1789) and passed the First Judiciary Act of September 24, 1789. The cessions by Maryland (Acts of December 23, 1788, and December 19, 1791) and Virginia (Act of December 3, 1789), accepted by Congress in 1790 (Act of July 16, 1790; 1 Stat. 130, c. 28), did not vest jurisdiction of the new seat of government in the United States until December 1800.

Provision for the government of this area was not made until February 27, 1801 (2 Stat. 103, c. 15), and even that provision was limited to the creation of local courts and related matters. The laws of the ceding states remained operative in the District except as changed by federal statute. *Russell* v. *Allen*, 107 U. S. 163; *Rhodes* v. *Bell*, 2 How. 397, 404; *Tayloe* v. *Thomson*, 5 Pet. 358, 368. The local government was expanded and reorganized in a successive series of Congressional enactments beginning in 1812 and culminating in the present Organic Act of June 11, 1878 (fn. 22, *infra*).

See D. C. Code (1940) p. XXVIII *et seq.* for text of various statutes referred to in this footnote.

the United States,[21] operating under an extensive and permanent system of government,[22] and ranking in community, commercial and physical stature with the states proper if not so outranking many of them.[23] Consequently, while in 1804 there may have been practical basis for a contrary conclusion, the size and significance of the District in the commercial and economic life of the nation in the year 1948 now requires its being treated as a state for purposes of the problem at hand.[24] Apart from the effect the then characteristics of the District may have had upon the decision in the *Ellzey* case, it has also been suggested that the contemporaneous power struggle between the Federalists and the followers of Jefferson and the resultant opposition to the federal courts may have influenced Marshall's cautiously restrictive approach in that case.[25]

With these considerations in mind, it would not be without precedent for this Court to determine that the changed economic and political scene requires a different approach to and conclusion for the problem. Cf. *Erie R. R. v. Tompkins*, 304 U. S. 64, reversing the ninety-five year rule as to whether the federal courts must follow state decisions on matters of general law; and *The Genesee Chief v. Fitzhugh*, 12 How. 443, where this Court refused to allow the definition of the term "admiralty jurisdiction" in effect at the time of the adoption of the Constitution because the Court was convinced that the scope and usage

[21] The U. S. Department of Commerce, *Sixteenth Census of the United States, 1940, Population*, Vol. II (3) pp. 555, 566, shows that the District had a population of 633,091 in 1940, the year in which the statute here in question was enacted.

[22] See present Organic Act of the District of Columbia entitled AN ACT PROVIDING A PERMANENT FORM OF GOVERNMENT FOR THE DISTRICT OF COLUMBIA, (Act of June 11, 1878; 20 Stat. 102; D. C. Code [1940] p. LVIII).

[23] Even as early as 1882 some courts realized that the changed status of the District called for a broader application of the word "state" as employed in the diversity clause. See *Watson v. Brooks*, 13 Fed. 540, 543-544 (C. C. D. Oregon).

[24] Weston, *op. cit. supra* fn. 5, 16 Geo. Wash. L. Rev. at 387-388.

of the term had changed with the intervening years to include rivers and lakes as well as merely tidal waters, which could not have been foreseen by the constitutional framers.

3. Treating the District as a State for diversity purposes is suggested by analogous decisions of this Court.

Other decisions of this Court demonstrate that, in determining whether the word "state" is to be applied to the District of Columbia, the term is to be read in the context of, and to effectuate, its specific constitutional purpose. Thus in *Loughborough* v. *Blake*, 5 Wheat. 317, the Court upheld universal direct federal taxation, made statutorily applicable to the District, on the grounds that the taxing power was a general one extending throughout the United States without limitation as to place, and that the provision of Article I, Section 2 ("* * * direct taxes shall be apportioned among the several states * * * according to their respective numbers") merely furnished a standard for apportionment. Similarly, in *De Geofroy* v. *Riggs*, 133 U. S. 258, the District of Columbia was held to be one of "the states of the Union" within the meaning of that term as used in a consular convention with France which assured certain rights to French citizens in the states of the Union. In answer to the contention that the assurances of the Convention were not operative within the District of Columbia, this Court stated that "No plausible motive can be assigned for such discrimination. A right which the government of the United States apparently desires that citizens of France should enjoy in all the states it would hardly refuse to them in the District embracing its Capitol * * *". 133 U. S. at 271. The District has also been treated as a state by this Court in other similar contexts.[20]

[20] See e. g. *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (commerce clause); *Embry* v. *Palmer*, 107 U. S. 3 (full faith and credit).

For collection of various cases involving question whether the District is a "state" see 29 Georgetown L. J. 193 (1940).

As in the *Loughborough* case, it might be said here that the diversity clause merely furnished a standard and set a policy for legislative action and that the word "state" was there used merely in a general descriptive or geographic sense for specific legislative definition as required by the times. And, as in *De Geofroy*, no plausible motive can be assigned for the discrimination that would be effected by the contrary construction by the lower court.

Accordingly, it is submitted that the District of Columbia is a state within the meaning of Article III, Section 2 and should have been so considered under the First Judiciary Act of 1789 without the necessity of resorting to the 1940 Amendment, *Hepburn* v. *Ellzey* notwithstanding. If *Hepburn* v. *Ellzey* is not overruled, the 1940 Amendment should be held to be a valid exercise of legislative power by Congress contemplated both by the Constitution and by the express language of *Hepburn* v. *Ellzey*.

II.

ARTICLE I, SECTION 8 OF THE CONSTITUTION AUTHORIZES THE GRANT OF FEDERAL JUDICIAL JURISDICTION OVER SUITS BETWEEN CITIZENS OF THE DISTRICT AND OF THE STATES PROPER.

A. Congress Has Plenary Authority to Legislate for the Benefit of the District and Its Citizens.

The courts have repeatedly held—as is implicit in the power to make "all laws which shall be necessary and proper" [28]—that the power of the United States in respect of the government and administration of the District of Columbia is plenary and far-reaching, and that it can be exercised as Congress sees fit, subject only to express constitutional limitation. *O'Donoghue* v. *U. S.*, 289 U. S. 516. Chief Justice Marshall recognized the broad reach of that power in holding that it was to be exercised as a national

[28] Article 1, Section 8, Cl. 18, *supra*, p. 3.

power throughout the Union rather than merely as a local function. *Cohens* v. *Virginia*, 6 Wheat. 264, 424-429. See also *Embry* v. *Palmer*, 107 U. S. 3; *Neild* v. *District of Columbia*, 110 F. 2d 246, 250-251 (App. D. C.).

This power has never known curtailment. It, of course, includes the power to provide forums for the settlement of disputes involving District citizens; and the courts established by Congress in and for the District under this power are national courts or so-called "constitutional courts" created under Article III and having the same general characteristics and jurisdiction as the general federal courts created under that Article. *O'Donoghue* v. *United States*, *supra*.

In short, the 1940 amendment of the Judicial Code was a legitimate exercise of the plenary power of Congress with respect to the District of Columbia if that law was "necessary and proper." That it was, has already been decisively determined by Congress. In its report accompanying the bill which became the amending act of 1940, the Judiciary Committee of the House of Representatives, after stating the purpose of the bill and reciting at some length the reasons and authority from which it concluded that "there appears to be no constitutional objection to this bill", stated:

> "It is submitted that H. R. 8822 is a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories. It should be borne in mind that the citizens of the District of Columbia and of the Territories are citizens of the United States. They are subject to the burdens and obligations of such citizenship just as are the citizens of the 48 States. Simple justice requires that they should share the rights and privileges of such citizenship insofar as Congress has authority to confer upon them. This is the real intent of the Constitution. [27]

[27] H. Rep. 1775, 76th Cong., 2nd Sess., accompanying H. R. 8822.

If any doubts remain, the soundness of this recent legislative finding of necessity would appear confirmed by Chief Justice Marshall's comment that the previous discrimination against citizens of the District was "extraordinary", as well as by the expressed purpose of the constitutional framers in creating diversity jurisdiction in the first instance. Assuming, as we must, in view of the constitutional determination, that diversity jurisdiction is necessary and proper, it is equally necessary and proper for citizens of the District for, as already shown, such citizens are subject to the same apprehensions as are citizens of the states, and it was because of that identical kind of apprehension that diversity jurisdiction was conceived. See dissent below R. 19, fn.*.

Accordingly, there remains only the question whether there is any affirmative constitutional limitation upon the exercise of the power under Article 1, Section 8 (cl. 17 and 18) in the form articulated in the 1940 Amendment.

B. The Federal Government's Power Over the District is Not Limited Territorially to the District.

It was suggested by the majority below (R. 15) that the power of the federal government under Article I, Section 8 is limited territorially to the District. But Clause 17 contains neither an express nor implied limitation to that effect, and such a limitation would appear negated by the authority conferred upon Congress under Clause 18, "to make all laws which shall be necessary and proper" to carry out its duties under Clause 17. It would appear sufficient under these provisions that Congress determine, as it did here, that it is necessary and proper for the proper government of the District and for the welfare of its citizens to make a particular law operative beyond the borders of the District. Moreover, the determination by this Court that Congressional authority over the affairs of the District is national in character and can be exercised throughout the United States (see discussion *supra* pp. 20-21) is

clearly inconsistent with any such territorial limitation of power.

The only discernible basis for this limiting contention of the majority below is by analogizing the status of the District to that of a state proper, i.e, since state government is operative only within the state's territorial borders, the federal legislative authority over the District of Columbia is similarly limited. The rationale would have to be that federal authority exercised for the District is no greater than that of a state proper. However, if for purposes of Article I, Section 8 (Cl. 17 and 18), the constitutional draftsmen intended the District to be accorded the status of a state, then there is reason to attribute to them a similar intention with respect to Article III, Section 2. If no such intent can be attributed with respect to Article III, then no such intent should be imputed to limit the authority conferred by Article I (Cl. 17 and 18).

C. The Power Granted in Article I, Section 8 Supplements and is Not Limited by Article III, Section 2.

It has also been argued, in derogation of the constitutionality of the 1940 Act as an exercise of the plenary authority over the District, that the power conferred by Article I, Section 8 "is conditioned by and to be interpreted in the light of" the limitations of Article III, Section 2, and that the latter article fixes the jurisdictional limits of federal judicial authority. (See majority opinion below at R. 17). However, it can as readily be said that Article III is "conditioned by, and to be interpreted in the light of" Article I, Section 8.

Article III "does not express the full authority of Congress to create courts". *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. Nor does it reflect the full panorama of federal judicial jurisdiction. *Williams* v. *United States*, 289 U. S. 553. The authority to create courts in and for the District of Columbia, under the power conferred by Article I, Section 8, is one facet of that extra-Article III authority. And

the *O'Donoghue* case, *supra*, held that a so-called constitutional court created under Article III can be vested with jurisdiction beyond that specified by that Article. While the *O'Donoghue* case, on its facts, merely approved a merger in the courts of the District of Columbia of judicial functions incident to the exercise of Article I powers with those prescribed in Article III, there is no reason why a similar merger cannot be effected in the other federal courts for the benefit of the citizenry of the District of Columbia who have the same need for federal diversity jurisdiction and for whom Congress sits as a legislature. The rule against vesting legislative or administrative functions in constitutional courts[28] certainly has no vitality with respect to a merger of strictly judicial functions. Indeed there is considerable authority in historic practice and decision for such a merger. In *Williams* v. *United States*, 289 U. S. 553, involving the question whether the Court of Claims was an Article III court for purposes of legislation affecting the salaries of its judges, this Court held that the Court of Claims exercised judicial power within the framework of the Constitution in deciding cases involving claims against the government, and further stated (289 U. S. at 565-566):

> "* * * the Court of Claims, originally nothing more than an administrative or advisory body, was converted into a court, in fact as well as in name, and given jurisdiction over controversies which were susceptible of judicial cognizance. It is only in that view that the appellate jurisdiction of this court in respect of the judgments of that court could be sustained or concurrent jurisdiction appropriately be conferred upon the federal district courts. The Court of Claims, therefore, undoubtedly, in entertaining and deciding these controversies, exercises judicial power, but the question still remains—and is the vital question—whether it is the judicial power and defined by Art. 3 of the Constitution."

[28] See *Williams* v. *United States*, 289 U. S. 553, 565-567.

> "That judicial power apart from that article may be conferred by Congress upon legislative courts, as well as upon constitutional courts, is plainly apparent from the opinion of Chief Justice Marshall in American Ins. Co. v. 356 Bales of Cotton, 1 Pet. 511, 546, dealing with the territorial courts: 'The jurisdiction,' he said, 'with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States.' That is to say, (1) that the courts of the territories (and of course, other legislative courts) are invested with judicial power, but (2) that this power is not conferred by the third article of the Constitution, but by Congress in the execution of other provisions of that instrument. The validity of this view is borne out by the fact that the appellate jurisdiction of this court over judgments and decrees of the legislative courts has been upheld and freely exercised under acts of Congress from a very early period, a practice which can be sustained, as already suggested, only upon the theory that the legislative courts possess and exercise judicial power—as distinguished from legislative, executive or administrative power—although not conferred in virtue of the third article of the Constitution. 'The authority to naturalize aliens has been vested in the courts from the beginning of the government; and it cannot be doubted that in discharging this function the courts exercise judicial power.'"

Thus the *Williams* case, approving review of Court of Claims decisions by the Supreme Court,[29] also demonstrates that the federal constitutional courts generally can legislatively be given judicial power beyond that specified in Artice III, Section 2. It is important to note the favorable reference there made by this Court to the fact that the federal district courts have been given concurrent jurisdiction under the Tucker Act[30] with the Court of Claims of

[29] See § 1255, new Judicial Code (1948).

[30] 43 Stat. 972, 28 U. S. C. 41 (20).

these extra-Article III cases, when the amount in controversy is less than $10,000. A similar grant of jurisdiction to the federal district courts to hear war risk insurance cases also received the judicial blessing. *United States* v. *Hossman*, 84 F. 2d 808 (C. C. A. 8). Note also the scope of the jurisdiction conferred upon district courts by the Federal Tort Claims Act (Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843; 28 U. S. C. § 921 *et seq.*).

That Article III Courts can be vested with non-Article III judicial jurisdiction is also established by the practice with respect to appeals from the territorial courts. Several of the circuit courts of appeal are vested with such appellate jurisdiction which is not limited to Article III Section 2, cases.[31] Moreover, this court made it clear in *Amado* v. *United States*, 195 U. S. 472 and *Laurel Oil & Gas Co.* v. *Morrison*, 212 U. S. 291 [32] that the jurisdiction of the several courts of appeal over cases coming from the territorial courts was dependent solely on statute and not necessarily limited to federal questions or to diversity cases within the classifications of Article III, Section 2, but based on the fact that such territorial courts exercise judicial power.

It must be recognized, therefore, that Article III must be read together with all other sources of authority in the Constitution and that the courts created thereunder are empowered to consider not only judicial matters of the

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[31] Under the new Judicial Code, the appropriate circuit courts of appeal (§ 1294) have general and unlimited jurisdiction of "all final decisions" (§ 1291) and various interlocutory decisions (§ 1292) of the District Courts of Alaska, the Canal Zone and the Virgin Islands. Jurisdiction of appeals from final decisions of the Supreme Courts of Puerto Rico and Hawaii is granted with respect to cases arising under the Constitution and laws of the United States and "all habeas corpus proceedings, and in all other civil cases when the value in controversy exceeds $5,000, exclusive of interest and costs" (§ 1293). Compare Section 128 of the old Judicial Code.

[32] See also *Ex parte Wilder's S. S. Co.*, 183 U. S. 545; *De Castro* v. *Board of Commissioners*, 221 U. S. 451; *Successor to Fantazzi* v. *Municipal Assembly of Arecibo, Puerto Rico*, 295 Fed. 803 (C. C. A. 1), certiorari granted 265 U. S. 577, certiorari quashed 268 U. S. 699.

types there enumerated, but also such other judicial matters as may, under the other provisions of the Constitution, be within the power of the Congress to confer upon them by legislation. The merger of such judicial functions in these courts makes them no less constitutional courts. Accordingly, Article III does not preclude Congress from granting to federal courts generally judicial functions, based upon the exercise by Congress of its legislative duties, under Article I, Section 8 (Cl. 17 and 18) for the government and welfare of the District of Columbia and its citizens.

CONCLUSION.

The Act of April 20, 1940 amending the Judicial Code is the long overdue and constitutionally motivated relief for the citizens of the District of Columbia from the discrimination practised by a too rigid application of the First Judiciary Act. The Act of April 20, 1940 accords the District the status of a state for purposes of the diversity clause of Article III, Section 2 of the Constitution in order that its citizens might be afforded equal access to federal courts generally with all other citizens of the United States, with aliens and with corporate bodies. Thus conceived, the statute comes within the spirit of if not the letter of the judiciary article of the Constitution and, in any event, within the legislative power to be exercised for the

welfare of the District. Accordingly, the Act should be deemed constitutional and the judgment below reversed.

Respectfully submitted,

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September, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

29

NATIONAL MUTUAL INSURANCE COMPANY
OF THE DISTRICT OF COLUMBIA,
Petitioner,

v.

TIDEWATER TRANSFER COMPANY,
INCORPORATED,
A Corporation of the State of Virginia,
Respondent.

BRIEF FOR RESPONDENT

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Respondent.

BRIEF FOR RESPONDENT

OPINIONS BELOW

The District Court of the United States for the District of Maryland did not file an opinion, but announced it was adopting its earlier opinion in *Feely v. Sidney S. Schupper Interstate Hauling System, Inc., and Breeding v. Same*, 72 Fed. Supp. 663 (1947). The majority (R. 10-18) and dissenting (R. 18-22) opinions of the United States Circuit Court of Appeals for the Fourth Circuit are reported at 165 F. 2d 531.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 31, 1947 (R. 22). The petition for a writ of certiorari was filed on March 3, 1948, and granted on March 29, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Now 28 U.S.C. 1254).

QUESTION PRESENTED

Is the Act of Congress of April 20, 1940, c. 117, 54 Stat. 143, constitutional insofar as it attempts to confer jurisdiction on the District Court of the United States for the District of Maryland to hear cases and controversies existing between a citizen of a State and a citizen of the District of Columbia?

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Respondent agrees with Petitioner and The United States that the Statutory and Constitutional Provisions referred to by them have been drawn into issue in this case. Respondent submits, however, that the provisions of Art. I, Sec. 8, Cls. 17, 18, have no application to the question herein involved.

STATEMENT OF THE CASE

The statements of the case presented by Petitioner and The United States accurately summarize the circumstances of the instant litigation.

SUMMARY OF ARGUMENT

The Act of April 20, 1940, which attempts to confer jurisdiction on the District Court of the United States for the District of Maryland to hear cases or controversies

existing between citizens of the States and citizens of the District cannot be sustained under either Art. III or Art. I, Sec. 8, Cls. 17 and 18 of the Constitution.[1]

I.

Article III provides in pertinent part that Congress may create inferior federal courts to hear cases and controversies "between citizens of different States". In 1805 this Court, speaking through Chief Justice Marshall, held in *Hepburn & Dundas v. Ellzey*, 2 Cr. 445, that a citizen of the District of Columbia was not a citizen of a State within the meaning of that Article and therefore that the federal

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[1] The Constitutionality of the 1940 Act has been passed upon by eleven district courts and two circuit courts of appeals. It has been declared unconstitutional by the Circuit Court of Appeals for the Fourth Circuit in this case, and by the Circuit Court of Appeals for the Seventh Circuit in *Central States Cooperatives v. Watson Bros. Transportation Co.*, 165 Fed. 2d 392 (1947), petition for writ of certiorari filed April 17, 1948, No. 43, this Term; and by the following district courts: *McGarry v. City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa. 1942); *Behlert v. James Foundation*, 60 F. Supp. 706 (S. D. N. Y. 1945); *Ostrow v. Samuel Brilliant Co.*, 66 F. Supp. 58 (D. Mass. 1946); *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. C. 1947); *Feely v. Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md. 1947); *Willis v. Dennis*, 72 F. Supp. 853 (W. D. Va. 1947); see, also, *Federal Deposit Insur. Corp. v. George-Howard*, 55 F. Supp. 921 (W. D. Mo. 1944), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8 1946), certiorari denied, 329 U. S. 719 (1946).

The Act was upheld in *Winkler v. Daniels*, 43 F. Supp. 265 (E. D. Va. 1942); *Glaeser v. Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif. 1944). The Petitioner and the United States have cited the case of *Duze v. Woolley*, 72 F. Supp. 422 (D. Hawaii 1947) as likewise holding the 1940 Act constitutional. It is true that the Court in that case held the Act constitutional insofar as it authorized the district court of Hawaii to entertain suits between citizens of the states and citizens of the territories, etc. The Court, however, remarked that Congress could invest the Courts of the district of Hawaii with any jurisdiction deemed necessary by virtue of Article IV, Sec. 3, Cl. 2 of the Constitution. Indeed the Court suggested that the Act might be unconstitutional insofar as it attempted to extend the diversity jurisdiction of the Federal Courts in the states.

courts in the States could not entertain suits between a citizen of the District and a citizen of a State on the ground of diversity of citizenship. Only those members of the American Confederacy who are entitled to representation in Congress and to electors for the election of the President are "States" within the meaning of the Judiciary Clause of the Constitution, he said. And though he admitted that it was extraordinary that under the Constitution the Courts of the United States were closed to citizens of the District, he held that the Judiciary was powerless to alter the terms of that instrument. The remedy, he suggested, was by a legislative enactment proposing an appropriate amendment to the Constitution. And this construction of the diversity clause in Article III has been repeatedly affirmed by this Court in all of its later opinions on the subject.

And since Art. III of the Constitution limits the diversity jurisdiction of the federal courts in the States, Congress is without power to increase that jurisdiction by an ordinary Act such as the Act of April 20, 1940.

II.

Petitioner and The United States say that the 1940 Act may be sustained under the provisions of Art. I, Sec. 8, Cl. 17 of the Constitution which grants to Congress exclusive legislation over the District of Columbia and the citizens thereof. That grant of power, however, is specifically confined to the geographic boundaries of the District, and it may not extend beyond those limits, unless the power sought to be exercised is to accomplish a national purpose, as distinguished from a purpose to benefit the citizens of the District of Columbia alone. *Cohens v. Virginia*, 6 Wheat. 264 (1821). The power of Congress over District citizens is analogous to its national power over aliens, but this Court has repeatedly asserted that Congress may not

extend the jurisdiction of the Federal Courts to include suits to which aliens are parties beyond the express limits of Article III of the Constitution. *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809).

And in any event, since the Act of 1940 would make a citizen of a State subject to suit in a federal court by a citizen of the District, then it has extended the jurisdiction of the State federal courts over citizens of the States beyond the limits of Article III of the Constitution. For, even should it be conceded that Congress may have the power under Art. I, Sec. 8, Cl. 17, to give the Federal Courts in the States jurisdiction over the citizens of the District, it may not so extend the Art. III jurisdiction of those courts insofar as citizens of the States are involved.

This Court held in *O'Donoghue v. United States*, 289 U. S. 516 (1933), that though Congress is empowered under Art. I, Sec. 8, Cl. 17, of the Constitution to extend the jurisdiction of the federal courts for the District of Columbia to include non-federal causes of action as well as administrative or legislative functions, it may not do so with the federal courts in the States. And a federal cause of action does not exist merely because a citizen of the District is involved.

If it is decided by this Court that Congress, under Art. I, Sec. 8, Cl. 17, was empowered to pass the Act of 1940, it would mean that since 1940, at least, every judgment rendered by a State Court in favor of or against a citizen of the District of Columbia is void, for want of jurisdiction in the State court to entertain the suit. Whatever power Congress has over the District and the citizens thereof, is exclusive of any power in the States to exercise concurrent power with respect thereto.

Should the Act of 1940 be sustained under the District Clause, the door would be opened to many other grave Constitutional questions.

ARGUMENT

I.

CITIZENS OF THE DISTRICT OF COLUMBIA ARE NOT CITIZENS OF A STATE WITHIN THE MEANING OF THE DIVERSITY CLAUSE OF ARTICLE III, SECTION 2 OF THE CONSTITUTION.

A. This Court in Hepburn and Dundas v. Ellzey So Decided.

Petitioner and the United States both contend that *Hepburn and Dundas v. Ellzey*, 2 Cr. 445 (1805), does not control the disposition of the constitutional question involved. It is their view that there Chief Justice Marshall merely decided that a citizen of the District of Columbia could not maintain a suit in the Circuit Court for the Virginia District, not because there was a constitutional inhibition against such Court assuming jurisdiction, but simply because the Congress of the United States had not seen fit, under the Judiciary Act of 1789 (1 Stat. 73), to extend the federal courts' diversity jurisdiction to include citizens of the District of Columbia, as well as citizens of different States.

We submit, however, that a full and proper reading of that opinion shows conclusively that a citizen of the District of Columbia is not a citizen of a *State* within the meaning of Article III, Section 2 of the Constitution, and, *a fortiori*, that Congress is without power to extend the constitutional concept of diversity of citizenship by the ordinary processes of legislation. It is significant that this same rule has been repeatedly announced by this Court. (*New Orleans v. Winter*, 1 Wheat. 91, 94 (1816); *Hooe v. Jamieson*, 166 U. S. 395 (1896); *Downes v. Bidwell*, 182 U. S. 244, 259 (1901);

Barney v. Baltimore City, 6 Wall. 280 (1867); *Metropolitan R. R. v. District of Columbia*, 132 U. S. 1 (1889); *O'Donoghue v. U. S.*, 289 U. S. 516, 543 (1933)). We do recognize, however, that Congress may properly initiate such an extension, if it chooses to exercise its extraordinary legislative right, *viz.*, to propose a constitutional amendment in accordance with the authority vested in it by Article V of the Constitution.

It is important to note that in the *Hepburn* case both the Plaintiffs and Defendant argued the jurisdictional question from the standpoint of Article III, Section 2. The Plaintiffs maintained that the term "State" as used in the Judiciary Act of 1789 had the same meaning as the word "States" in the Diversity Clause of the Constitution. They then cited numerous other sections of the Constitution where the word "States" was used, such as the full faith and credit clause (Article IV, Section 1), the clause prohibiting taxes or duties on exports (Article I, Section 9), the extradition clause (Article IV, Section 2), etc., and concluded that since "States" in those sections was obviously intended to include the District of Columbia then the same word when used in Article III, Section 2 should also be considered as including the District.

The defendant, on the other hand, contended (1) that the plaintiffs were not citizens of a State within the meaning of Article III, Section 2, and (2) that, in any event, the Judiciary Act was not intended to include citizens of the District and the Court, therefore, could take no jurisdiction which was not given by the Act.

With these arguments before it, the Court proceeded to determine whether the Circuit Court for the District of Virginia had jurisdiction.

The Chief Justice acknowledged that the District of Columbia, as a distinct political society, was "a State" according to the definitions of writers on general law. But, he said, the District of Columbia is not a State *within the meaning of the Constitution*, as that term included only the members of the American Confederacy; that is, those who are entitled to representation in the Senate and House of Representatives and those who are entitled to electors for the election of the President. He then added with respect to the representation and electoral clauses:

> "These clauses show that the word State is used in the constitution as designating a member of the union and excludes from the term the signification attached to it by writers on the law of nations. When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it."

And in disposing of the plaintiff's argument that the word "States" as used in other parts of the Constitution included the District, the Chief Justice said:

> "Other passages from the Constitution have been cited by the plaintiffs to show that the term State is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

How then can it be contended that the opinion of the Chief Justice was confined simply to the ruling that the Judiciary Act of 1789 did not permit suits by citizens of the District of Columbia in the federal courts?

But why, it is asked, did the Court approach the question before it by saying that it was necessary to look to the Judiciary Act of 1789, as the jurisdiction of the Circuit

Court "depends on the Act of Congress describing the jurisdiction of that Court"? The answer is clear. The Chief Justice recognized what has been declared to be the well-established rule that Article III of itself does not confer jurisdiction of any nature on the inferior federal courts created by Congress. Congress could, as it saw fit, grant to or withhold from such tribunals all or any part of the federal jurisdiction, defined in Article III, Section 2. As stated by this Court in *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922):

> "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it."

For the purpose of orderly procedure, therefore, the Chief Justice remarked, and properly so, that the first point of consideration was whether Congress in exercise of its power had bestowed on the Circuit Courts jurisdiction over the case in question. In order to resolve that question, it became necessary, said the Court, to interpret the word "State" as used in the Judiciary Act. But in so doing it was imperative to view that word in the light of how the term was used in the Judiciary Clause of the Constitution. If "States" as used in that instrument included the District of Columbia, then it would follow that Congress by the use of that same term had conferred the questioned jurisdiction on the Circuit Courts. If it did not include the District, then Congress had not granted this jurisdiction to those Courts.[2]

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[2] That Congress could not grant such jurisdiction in the latter instance is made abundantly clear by the Chief Justice's later ruling in *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809) where he said: "Turn to the Article of the Constitution of the United States, for the Statute cannot extend the jurisdiction beyond the limits of the Constitution."

When we recall the statement of the Chief Justice, that *"as the Act of Congress obviously uses the word 'State' in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument"*, it is apparent that it was there specifically decided that the District was not a State within the meaning of Article III, Section 2 of the Constitution. Cf. *Williams v. U. S.*, 289 U. S. 516, 573 (1933).

But the assertion is made that the Chief Justice's remark "but this is a subject for legislative not for judicial consideration", was an invitation to Congress to remedy the situation by giving the District of Columbia the status of a State for the purpose of diversity jurisdiction. It is perfectly obvious, however, that what the Chief Justice meant was that it was without the scope of the Judiciary to alter the express terms of the Constitution, but that Congress, if it deemed it necessary and advisable, could under the extraordinary legislative power vested in it by Article V of the Constitution initiate a change in Article III, Section 2 by proposing a constitutional amendment so as to specifically bring the District and the citizens thereof within the provisions of that Section. It is significant that at that time, there had already been twelve amendments to the Constitution, all of which had been proposed by Congress and ratified by the legislatures of the various States. And it was in this sense that the Chief Justice used the term "legislative". It is true that a constitutional amendment is extraordinary legislation, but that it is legislative in nature was recognized by Chief Justice Marshall in *Marbury v. Madison*, 1 Cr. 137, 177 (1803), where, after deciding that the jurisdiction attempted to be conferred on the Supreme Court by Section 13 of the Judiciary Act of 1789 was not authorized by Article III, he said:

> "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level

with *ordinary legislative acts*, and like other acts is alterable when the legislature shall please to alter it." (Italics added.)

And the same distinction was earlier made by Justice Chase in *Hollingsworth v. Virginia*, 3 Dall. 378 (1798), where, in upholding the eleventh amendment (which incidentally amended Article III, Section 2), he stated:

> "The negative of the President applies only to the *ordinary cases of legislation:* He has nothing to do with the proposition, or adoption of amendments to the Constitution." (Italics added.)[3]

If, therefore, after the passage of 135 years, Congress has suddenly decided that it is imperative to extend the diversity jurisdiction of all of the Federal District Courts to include suits to which a citizen of a District is a party, then let it accept the "invitation", if such it was, to propose an amendment to Article III, Section 2 of the Constitution for that purpose.[4]

B. Other Cases Holding Citizens of the District Not Within Diversity Clause of Constitution.

We are told that the cases following *Hepburn & Dundas v. Ellzey* do not say that the District of Columbia is not a State within the meaning of Article III, Section 2 of the Constitution, but only that citizens of the District could not be parties to diversity suits in the Federal Courts under

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[3] See further: *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. C. 1947); and *Willis v. Dennis*, 72 F. Supp. 853, 855 (W. D. Va. 1947) where the words of the Chief Justice were construed to mean that the Judiciary was powerless to modify the constitutional limitations.

[4] Indeed, we understand that Senator Wiley of Wisconsin, the Chairman of the Senate Committee on Judiciary, has stated that he will introduce an Act in Congress proposing such an amendment if this Court should affirm the order appealed from in the present case. (Washington Sunday Star, January 4, 1948, p. A-1, Col. 4.)

the then existing Judiciary Acts. We need but look to these later decisions, however, to find that such is not the case. In *New Orleans v. Winter*, 1 Wheat. 91, 94 (1816), where the question arose as to whether a citizen of the Territory of Louisiana was a citizen of a State within the meaning of Article III, Section 2 Chief Justice Marshall, in holding that he was not, declared:

> "It has been attempted to distinguish a *Territory* from the *District of Columbia;* but the Court is of opinion that this distinction cannot be maintained. *They may differ in many respects, but neither of them is a state in the sense in which the term is used in the constitution.*" (Latter italics added.)

Later in *Metropolitan R.R. v. District of Columbia*, 132 U. S. 1 (1889) this Court discussed at length the distinction between the status of the District of Columbia as a State in the sense of being a distinct political society and its status as a "State" within the meaning of the Judiciary Clause of the Constitution, and noted:

> "One argument of the plaintiff's counsel in this connection is, that the District of Columbia is a separate State or sovereignty according to the definition of writers on public law, being a distinct political society. This position is assented to by Chief Justice Marshall, speaking for this court, in the case of Hep. v. Ell., 2 Cranch, 445, 452, where the question was whether a citizen of the District could sue in the Circuit Courts of the United States as a citizen of a State. The Court did not deny that the District of Columbia is a State in the sense of being a distinct political community, but held that the word 'State' *in the Constitution*, where it extends the judicial power to cases between citizens of the several 'states', refers to the States of the Union. Therefore, whilst the District may, in a sense be called a state, it is such in a very qualified sense."

And in 1896, Mr. Justice Fuller in *Hooe v. Jamieson*, 166 U. S. 395, reaffirmed the same rule, stating at page 397:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn v. Ellzey*, 2 Cranch, 445, Feb. Term 1805 *'that the members of the American Confederacy only are the states contemplated in the Constitution'; that the District of Columbia is not a State within the meaning of that instrument;* and that the Courts of the United States have no jurisdiction over cases between citizens of the District of Columbia and citizens of a State." (Italics added.)

Similarly in *Downes v. Bidwell*, 182 U. S. 244, 259 (1901) Justice Brown stated:

> "The earliest case is that of *Hepburn v. Ellzey*, 2 Cranch 445, in which this Court held that, under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different states, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States."

See also *O'Donoghue v. U. S.*, 289 U. S. 516, 543 (1933) where Justice Sutherland acknowledged as an established proposition:

> "That the District of Columbia and the territories are not states, *within the judiciary clause of the Constitution* giving jurisdiction in cases between the citizens of different States." (Italics added.)

And as was said by Mr. Justice Nelson in *Prentiss v. Brennan*, #11, 385, 19 Fed. Case 1278 (1851):

> "A person may be a citizen of the United States and not a citizen of any particular State. *This is the condition of citizens residing in the District of Columbia* and in the territories of the United States or who have taken up residence abroad and others that might be mentioned." (Italics added.)

Thus, despite the denials of the Petitioner and the United States, it is apparent that the Court in these later cases specifically held that a citizen of the District was not a citizen of a "State" within the meaning of the diversity clause of the Constitution. It is of particular significance that in none of those cases was any reference made to the Judiciary Act of 1789, or to any other Judiciary Act.[5]

In further support of their argument that the District is included within the meaning of "States" in the Diversity Clause, Petitioner and The United States have repeatedly asserted that the word "State" as used in other parts of the Constitution has been construed in many instances by this Court to include the District. We submit, however, that a review of the cases they cite indicates the contrary.

For instance, in *Loughborough v. Blake*, 5 Wheat. 317 (1820), Chief Justice Marshall did not hold that the District of Columbia was a State for purposes of direct taxation by Congress under Article I, Section 2, Clause 3. What the Chief Justice did say was that the general grant of power to Congress to lay and collect taxes was made in such broad terms as to include the District of Columbia and the territories as well as the States. He then went on to say that even if the general language of the Constitution as to taxation should be confined to the States, still Article I, Section 8, gives Congress the power to exercise exclusive legislation in all cases whatsoever *in* the District of Columbia, and that in any event, Congress would therefore have the power to lay and collect taxes in that District. As a matter of fact, the Chief Justice, in speaking of the constitutional limitation on direct taxation, said:

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[5] See further:—*Barney v. Baltimore*, 6 Wall. 280 (1868); *Slaughter-House Cases*, 16 Wall. 36, 73, 74 (1873); *Anderson v. U. S. Fidelity & Guaranty Co.*, 8 Fed. (2d) 428, 429 (D. C. S. D.-Fla. 1925); Willoughby, *Constitution of the United States* (2d Ed.) Vol. I, p. 346, sec. 194.

> "If * * * a direct tax be laid at all, it must be laid on every State conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. *But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories.*" (Italics added.)

Stoutenburgh v. Hennick, 129 U. S. 141 (1889), is cited as holding that the District is a State within the meaning of the Congressional power over commerce among the several "States". We again submit that this Court did not so hold, but in fact held that the District of Columbia was a municipality and that Congress could legislate with respect to commerce *in* the District of Columbia by virtue of the authority granted to it over the District by Article I, §8, Cl. 17, of the Constitution. (See: Note (1904) II Michigan Law Review 468.)

Nor was it held in *Embry v. Palmer*, 107 U. S. 3 (1883), that the District of Columbia was a "State" as that word is used in the full faith and credit clause of the Constitution. The decision was based upon other applicable provisions of the Constitution wherein the word "State" was not employed. See: Willoughby, *Constitution of The United States* (2d Ed.) Vol. I, p. 256, Sec. 145.

And in *Geofroy v. Riggs*, 133 U. S. 258 (1890), this Court, in order to give effect to the reciprocal provisions of the Treaty with France, held that the words, "the States of the Union" within the meaning of that treaty were intended to include all distinct political societies and not only the States making up the American Confederacy. The Court specifically recognized the doctrine enunciated in the *Hepburn* case that the District of Columbia is not a State as that term is used in the Constitution, though recog-

nizing that it may be a State in the sense that it is a distinct political society.

We do not wish to burden the Court with a discussion of all of the cases cited by Petitioner and The United States on this point. Suffice it to say, we contend that none of the cases cited prove the point sought to be proved.

In fact, a similar argument was made by counsel for the Plaintiffs in the *Hepburn Case* which, as noted above, was summarily dismissed by Chief Justice Marshall when he said:

> "Other passages from the Constitution have been cited by the Plaintiffs to show that the term 'State' is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

In passing, we wish to point out the very apt observation of Coleman, J., in *Feely v. Schupper, etc.*, 72 F. Supp. 663 (Md. 1947) where the same argument was presented in an attempt to sustain the very act which is now before the Court. Judge Coleman said:

> "But this argument overlooks the fact that, with respect to an interpretation of the phrase 'between Citizens of different States' as it appears in the Constitution, Art. III, Sec. 2, the Supreme Court *has* been consistent in holding that the District of Columbia was *not a State*. Hooe v. Jamieson, supra; Barney v. Baltimore City, supra, Hepburn v. Ellzey, supra; see also O'Donoghue v. United States, supra, at p. 543. If, prior to the 1940 amendment to 28 U.S.C.A. Sec. 41 (1), the District of Columbia was not a State, in the sense that that word is used in the diversity of citizenship clause of the Constitution, can it be said that now, after the 1940 amendment to the judiciary code, the Constitution means something different merely by reason of a

> construction placed upon it by Congressional legislation? The Constitution, being supreme, is not subject to mere legislative revision."[6]

And in addition to the overwhelming authority of the earlier cases, the Courts in more recent decisions have indicated that no other result could now be reached in view of the Fourteenth Amendment. These cases point out that diversity of citizenship as required by Art. III, Sec. 2, is lacking unless the parties are citizens of different States in the sense that that term is used in the Fourteenth Amendment. In other words, it is recognized that there is a difference between citizenship of the United States and citizenship of a State and it is the latter citizenship that is required for purposes of diversity jurisdiction.

Thus in *Bankers' Trust Company v. Texas and Pacific Railway*, 241 U. S. 295 (1916), where the question of jurisdiction in the Federal Courts under the diversity clause arose, Justice Van Devanter, speaking for this Court said:

> "Whether this is a suit between citizens of different states turns upon whether the Texas and Pacific Company is a citizen of Texas. It is doubtful that the pleader intended to state a case of diverse citizenship, but, be this as it may, we are of opinion that the Company is not a citizen of any State. * * * Of course, it is a citizen of the United States in the sense that a Corporation organized under the laws of one of the States is a citizen of that State, but it is not within the clause of the Fourteenth Amendment which declares that

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[6] We ought not overlook the many pronouncements of this Court that in cases of doubt, the "solemn, deliberate, well considered and long settled decisions of the judiciary and the quiet assent of the people to an unbroken and unvarying practice ought to conclude the action of Courts in favor of a principle so established, even when the individual opinions of the judges would be different were the question *res integra*." *Veazie Bank v. Fenno*, 8 Wall. 533, 541-2 (1869); *Wilkinson v. Leland*, 2 Pet. 627, 657 (1829); *Missouri v. Illinois*, 180 U. S. 208, 219 (1901).

native born and naturalized citizens of the United States shall be citizens of the state wherein they reside

Though he may be a naturalized citizen of the United States, he is not domiciled in any state, and he is not a citizen of any state, under the Fourteenth Amendment. To sue in a Federal District Court, it is not enough to be a citizen of the United States. One must be a citizen of a state."[7]

This case clearly indicates that for purposes of diversity jurisdiction the parties must be citizens of actual States admitted to the Union and not merely citizens of a fictional "State" such as Congress has attempted to make the District of Columbia by the Act of 1940. (See also: *Schick v. United States*, 195 U. S. 65, 68 (1904).)

But Petitioner insists that the citizens of the District of Columbia were, before the cession, citizens of Maryland or Virginia, and thus entitled to the advantages and benefits intended by the diversity clause of Article III, Section 2 and that, therefore, these constitutional assurances of the diversity clause should not be taken from them. The reason for such a conclusion, however, is not apparent to us. Surely, the Petitioner did not mean to say that because the District of Columbia consists of the territory ceded by the States of Virginia and Maryland that the inhabitants of the District have the status of citizens of a State. This very question was decided to the contrary by Chief Justice Marshall in *Reily v. Lamar* 2 Cr. 344 (1805), where he stated:

"By separation of the District of Columbia from the State of Maryland the complainant ceased to be a citizen of that State, his residence being in the City of Washington at the time of that separation."

[7] And note that in *Neild v. District of Columbia*, 71 App. D. C. 306, 316, 110 F. 2d 246, 256, it was held that the Fourteenth Amendment is not applicable in the District of Columbia, since it is not a State. See also: *Hurd v. Hodge*, 334 U. S. 24 (1948).

Yet Petitioner has quoted extensively from *Downes v. Bidwell*, 182 U. S. 244, 260-261 (1901), and *O'Donoghue v. United States*, 289 U. S. 516, 540 (1933), with the apparent intention of creating the impression that citizens of the District retained their status as citizens of a State following the cession. However, it is clear from the passages quoted that what the Court said was that citizens of the District retained their status as citizens *of the United States*. Nowhere does the Court in either case suggest that the citizens of the District retain their status as citizens of a State. In fact, it specifically held otherwise. Indeed, as has already been pointed out, Justice Sutherland in the *O'Donoghue* case cited with approval the conclusions arrived at by Justice Brown in *Downes v. Bidwell, supra*, one of which was:

> "'That the District of Columbia and the territories are not States, within the judicial clause of the Constitution, giving jurisdiction in cases between the citizens of different States.'"

If the Petitioner's reasoning be based solely on principles of equality, such a contention is aptly answered in *Central States Co-ops v. Watson Bros. Transp. Co.*, 165 F. (2d) 392, 397 (C. C. A. 7th 1947) where in holding the Act of 1940 unconstitutional the Court said:

> "The argument that the citizens of the District of Columbia are entitled to the same rights and privileges as those of the States, including that provided by the amendment with which we are now concerned, is appealing, but it is of little if any consequence relative to the question with which we are now confronted. In response to a similar argument, the court in Feeley v. Sidney S. Schupper Inter-State Hauling System, supra, stated D. C. 72 F. Supp. at page 667:
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> "'The District of Columbia, by reason of its being the seat of the national government and under the exclusive jurisdiction of Congress by Article I, Section

8, Clause 17, is totally unlike any other governmental area in our union. It is not like a State, it is not like a territory. It is an area that is in a class by itself. Its anomalous position has been repeatedly recognized by the Courts. (Citing cases.) The prima facie discrimination against residents of the District, therefore, loses substance when it is considered in the light of a wholly exceptional situation, created by the framers of the Constitution out of necessity for a national capitol, from whose very nature flow many unusual consequences.'"

Moreover, if the Petitioner's contention be correct, then a similarly valid argument is that, since the citizens of the District, before the cession, were entitled to vote for representatives in Congress and for electors for the election of the President, then they are now likewise entitled to the same rights and advantages in those respects.

The simple proposition is that the citizen of the District cannot claim all the rights and advantages enjoyed by the citizens of the States, nor can there be imposed upon citizens of the District all the duties and burdens imposed upon citizens of the State, because citizens of the District are not citizens of a State.

A further attempt has been made to bolster the argument that the District is a State within the meaning of the diversity clause by stating that that clause was intended to offer to all non-residents of a particular State full opportunity for the settlement of disputes removed from local prejudices and influences, and that, therefore, citizens of the District were obviously intended to be included therein. This argument reflects the view expressed by Judge Parker in his dissenting opinion in the Circuit Court of Appeals in this case to the effect that the 1940 Act is obviously dictated by the most basic considerations of justice and that the same reasons for making the Federal District Courts

available to the citizens of the 48 states likewise apply to the citizens of the District (R. 18, 19). But such an argument does not, as remarked by Judge Coleman in the *Schapper* case, meet the constitutional point involved. Judge Coleman said that in view of *Erie Railroad Co. v. Thompkins*, 304 U. S. 64 (1938) citizens of the District of Columbia are not in such an unfavorable position as the proponents of the Act of 1940 suggest. Citizens of the District, he said, may still sue in the Courts of the District of Columbia and in the State Courts, and since the *Thompkins* case requires the Federal Court to apply the State law as declared by the highest State Court, then citizens of the District should not suffer any substantial disadvantage from having to sue in a State Court.[8] He also reminds us that whenever a federal question is involved, a citizen of the District of Columbia may sue in the Federal Courts; and that by virtue of the Fourteenth Amendment he is protected against any State abridgement of his privileges and immunities as a citizen of the United States as well as against any deprivation by a State of due process of law or of the equal protection of the laws.

Moreover, we need hardly mention that arguments as to the desirability or practicality of the 1940 Amendment

[8] See also Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction*, (1948) 15 D. C. Bar Assn. J. 55, 63, in answer to the same argument where it was pointed out that the Citizens of the District of Columbia endured the "discrimination" for 135 years without material outcry, during most of which period "the right to resort to Federal Courts was often of substantial importance because the Federal Courts apply their own doctrines of general law". Mr. Walker also notes that the right not to be compelled to litigate in the Federal Forum is often regarded as a valuable right of the District citizen, noting that in *Glaeser v. Acacia Mutual Life Assn.*, 55 F. Supp. 925 (N. D. Calif. 1944); *Wilson v. Guggenheim*, 70 F. Supp. 417 (E. D. S. Car. 1947); and *Duze v. Woolley*, 72 F. Supp. 422 (D. Hawaii 1947) the attack on the constitutionality of the 1940 Amendment was made by the party who was a citizen of the District and who did not want to litigate in the Federal Court.

is of no avail in a case of this kind where the only question is whether Congress has exceeded the limits of the authority conferred on it by the Constitution. As Mr. Justice Murphy recently remarked in his dissenting opinion in *Adamson v. California*, 332 U. S. 46, 125 (1947): "Much can be said pro and con as to * * * desirability * * *. But policy arguments are to no avail in the case of a clear constitutional command."

II.

CONGRESS IS WITHOUT POWER TO ENLARGE THE DIVERSITY JURISDICTION OF THE DISTRICT COURT FOR THE DISTRICT OF MARYLAND BEYOND THE LIMITS OF ARTICLE III, SECTION 2 OF THE CONSTITUTION.

Since the District of Columbia is not a State within the meaning of Article III, Section 2 of the Constitution, then Congress may not extend the jurisdiction of the Federal District Court for the District of Maryland to include controversies between a citizen of a State and a citizen of the District of Columbia.

This doctrine was firmly established by Chief Justice Marshall in the case of *Hodgson v. Bowerbank*, 5 Cr. 303 (1809). In that case, the plaintiff had been described in the bill of complaint as an alien, but no allegation was made that the defendant was a citizen of some one of the United States. The Judiciary Act of 1789 purported to give jurisdiction to the Circuit Courts in all suits in which an alien was a party. Article III, Section 2 of the Constitution provided, however, that the federal courts should have jurisdiction in all suits between aliens and a citizen of a State. Chief Justice Marshall in holding that Congress was without power to confer jurisdiction on the Circuit Courts in *all* suits in which an alien is a party, said:

> "Turn to the Article of the Constitution of the United States, for the Statute cannot extend the jurisdiction beyond the limits of the Constitution."

The *Hodgson* case is particularly apposite for Congress had there attempted to extend the jurisdiction of federal courts to include cases or controversies existing between parties not contemplated within Article III, Section 2, just as the Congress by the Act of April 20, 1940 has attempted to extend the jurisdiction of federal courts to include cases or controversies existing between parties not contemplated within that same Article and Section. As the first Act of Congress was unconstitutional, so also is the Act in this case.

As was appropriately said by this Court in *Kline v. Burke Construction Co.*, 260 U. S. 226, 233-234 (1922):

> "By Sec. 2 of Article III it is provided that the judicial power shall extend to certain designated cases and controversies and, among them, 'to controversies * * * between citizens of different States * * *'. The effect of these provisions is not to vest jurisdiction in the inferior courts over the designated cases and controversies, *but to delimit those in respect of which Congress may confer jurisdiction upon such Court as it creates* * * *. That body may give, withhold, or restrict such jurisdiction in its discretion, *provided it be not extended beyond the boundaries fixed by the Constitution.* * * *. The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases but it requires an act of Congress to confer it." (Italics added.)[9]

[9] See also *Levin v. U. S.*, 128 Fed. 826, 829-831 (C. C. A. 8th 1904) where Judge Sanborn stated that the judicial power granted by Section 1 of Article III extended only to the trial of the classes of cases enumerated in Section 2. And see: *Marbury v. Madison*, 1 Cr. 137 (1803); *Muskrat v. U. S.*, 219 U. S. 346 (1911); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693, 700, (1927); *Ex Parte Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Williams v. U. S.*, 289 U. S. 553, 565 (1933); *O'Donoghue v. U. S.*, *supra*; *Lockerty v. Phillips*, 319 U. S. 182, 187 (1943); Dobie, *Federal Procedure* (1928), Sec. 14; McGovney, *A Supreme Court Fiction* (1943) 56 Harvard Law Review 853, 854-855; 1 Moore, *Federal Practice*, Sec. 0.08.

III.

THE ACT OF APRIL 20, 1940, CANNOT BE SUSTAINED UNDER THE PROVISIONS OF ARTICLE I, SECTION 8.

Judge Parker, dissenting in the court below, admitted that the District of Columbia is not a State within the meaning of Article III, Section 2, but asserted that the words in that section must be construed in connection with other provisions of the Constitution, as they are not words of limitation and do not by implication exclude jurisdiction in those classes of cases not therein enumerated but permissible under other sections (R. 19-20). He then said that Congress has the power under Article I, Section 8, Clause 17 to grant to citizens of the District the right to sue and be sued in all Federal Courts.

It is apparent, however, from the very wording of this Clause that the power conferred on Congress is limited to the geographical area constituting the District, for Article I, Section 8, Cl. 17 empowers Congress:

> "To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, * * *."[10]

The Clause itself specifically provides that Congress shall have exclusive legislation "over" the District, "as may * * * become the Seat of the Government of the United States" and contains the further proviso that such District shall

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[10] It is a well established rule that in expounding the Constitution every word must have it due force and appropriate meaning; no word was unnecessarily used and needlessly added. Every word appears to have been weighed with the utmost deliberation. No word in the instrument, therefore, can be rejected as superfluous or without meaning. *Holmes v. Jennison*, 14 Pet. 540, 571 (1840); *Williams v. U. S.* 289, U. S. 553, 572 (1933); see further: *Gibbons v. Ogden*, 9 Wheat. 1, 188 (1824).

not exceed "ten Miles square". It is, therefore, obvious that the framers of the Constitution intended that the power of Congress with respect to the District was to be limited to the actual geographical boundaries of that District. It is, of course, axiomatic that when the text of a constitutional provision is not ambiguous, where its meaning is plain and clear, the Courts are not at liberty to search for its meaning beyond the instrument itself. (*Dartmouth College v. Woodward*, 4 Wheat. 518, 644 (1819); *Fairbank v. U. S.*, 181 U. S. 283, 307 (1901).)

It was not by mere accident that the words "over such District (not exceeding ten Miles square) as may * * * become the Seat of the Government of the United States" were employed.[11]

The underlying reason for the insertion and adoption of this Clause in the Constitution was to insure that the Government would be free from the insults or undue influence of any particular State. The members of the Convention were mindful of the situation so well described by Mr. Iredell of North Carolina (Elliot, *Debates on the Federal Constitution*, Vol. IV, p. 219) who, in support of the District clause, said:

> "What would be the consequence if the Seat of the Government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating? Do we not all remember that in the year 1783, a band of soldiers went and insulted Congress? The

[11] As originally proposed in the Convention and referred to a Committee on August 18, 1787 the Clause read: "To exercise exclusively legislative authority at the Seat of the General Government, and over a District around the same, not exceeding . . . . square miles, the consent of the legislature of the State or States comprising such district being first obtained." Elliot, *Debates on the Federal Constitution*, Vol. I, p. 247 (1861).

sovereignty of the United States was treated with indignity. They applied for protection to the State they resided in but could obtain none. It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[12]

Although the members of the various State Ratifying Conventions generally recognized the desirability and necessity of giving Congress complete authority at the Seat of the Government, the inclusion of the District Clause was the source of much debate. A few were apprehensive that the Clause might be so interpreted as to enable Congress to grant exclusive privileges to citizens of the District, or to extend the powers of Congress therein granted beyond the District, thereby augmenting the general powers granted to it by other provisions of the Constitution. And they therefore suggested that it would be advisable to insert a Clause negating any power other than that expressly contained therein. (Elliot, *id*, Vol. III, pp. 431, 436, 454—remarks of Messrs. Grayson, Patrick Henry and Tyler.)

It was concluded, however, that since the exclusive power was specifically confined to the ten Miles square, Congress was "excluded as much from the exercise of any other authority as they could be by the strongest negative clause that could be framed", and therefore, further words of limitation were unnecessary. (Elliot, *id*, Vol. IV, p. 219—Mr. Iredell.)

And Mr. Madison, in answer to Mr. Grayson, was careful to point out that the Clause as worded did not give Congress any supplementary power or the power to impede the operation of any other part of the Constitution. He said:

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[12] See a similar statement by Mr. James Madison of Virginia. Elliot, *id*, Vol. III, p. 432-3.

"I cannot comprehend that the power of legislation *over a small district, which cannot exceed ten Miles square*, and may not be more than one mile, will involve the dangers which he apprehends. * * * Let me remark, if not already remarked, that there must be a cession, by particular states, of the district to Congress, and that the States may settle the terms of the cession.

If that latitude of construction which he contends for were to take place with respect to the sweeping clause, there would be room for those horrors. *But it gives no supplementary power. It only enables them to execute the delegated powers.* If the delegations of their powers be safe, no possible inconvenience can arise from this clause. * * *

"As the consent of the state in which it may be must be obtained, and as it may stipulate the terms of the grant, *should they violate the particular stipulations it would be an usurpation;* so that, if the members of Congress were to be guided by the laws of their country, none of those dangers could arise." (Italics added.) (Elliot, *id.*, Vol. III, pp. 432-3, 438.)

Probably the clearest statement of the limited scope of the District Clause was expressed by Mr. Pendleton of Virginia. He said:[13]

"Mr. Chairman, this clause does not give Congress power *to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the union at large.* But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings. Notwithstanding the violent attack upon it, I believe, sir, this is the fair construction of the

[13] Elliot, *id.*, Vol. III, pp. 439-40; see also remarks of Mr. Hamilton, The Federalist, No. XLIII, p. 2. Cf. *Curry v. D. C.*, 14 App. D. C. 423 (1899) where it was held that Congress is without power under this clause to grant exclusive hacking privileges in the District.

clause. It gives them power of exclusive legislation in any case *within* that district. What is the meaning of this What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures. *I understand it is opposed to the legislative power of that State where it shall be.* What, then is the power? Is it, that Congress shall exclusively legislate there, in order to preserve the police of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the State where it shall be. * * *

"Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. *It could have no operation without the limits of that district.* Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, *it could have no effect the moment it would go without that place; for their exclusive power is confined to that district.* Were they to pass such a law, it would be nugatory; and every member of the community at large could trade to the East Indies as well as the citizens of the district. *This exclusive power is limited to that place solely, for their own* preservation, which all gentlemen allow to be necessary." (Italics added.)

These remarks are of the utmost importance, when we consider the fact that immediately following them no further comments were made with respect to the inclusion of the District clause in the Constitution and the debates then shifted to the necessary and proper clauses.[14]

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[14] Furthermore, the members of the New York Convention ratified the Constitution under the following impression: "That the jurisdiction of the Supreme Court of the United States, or of any other court to be instituted by Congress, is not in any case to be increased, enlarged or extended by any fiction, collusion or mere suggestion * * *" (Elliot, *id.* Vol. 1, p. 329.)

The proponents of the 1940 Act, however, would have us believe that the clause has been interpreted differently by this Court, and that in fact Chief Justice Marshall, who was a member of the Constitutional Conventions which expressly limited the operation of clause 17 to the ten Miles square, held that the power of Congress under the clause in question was not confined to the District. They rely strongly on his statement in *Cohens v. Virginia*, 6 Wheat. 264, 424 (1821) that:

> "This power, like all others which are specified, is conferred on Congress as the legislature of the Union, for strip them of that character and they would not possess it. In no other character can it be exercised. In legislating for the District, they necessarily preserve the character of the legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation."

Thus, they say, since Congress acts as a national legislature, it can enact any and all legislation which it deems necessary for the welfare of the District and the citizens thereof, irrespective of the other limitations contained in the Constitution.

Not only is this view pregnant with danger in that it opens the door to Congress to by-pass the other provisions and prohibitions of the Constitution under the guise of exercising exclusive legislation over the District, but it throws into utter disharmony the *Cohens* Case and the many other decisions of this Court on the question. Our view of the case, however, harmonizes the opinions of the members of the Constitutional and State Ratifying Conventions as well as all of the cases on the subject.

The error of Petitioner's argument is apparent. It is true that Congress may within limits legislate nationally

for the benefit of all of the citizens of the *United States*. But when it legislates solely for the benefit of the citizens of the District, it does so in the same character as any State legislates for its citizens; that is, it acts as a local legislature. *Pollard's Lessee v. Hagan*, et al, 3 How. 212 (1845); *Capital Traction Company v. Hof*, 174 U. S. 1, 5 (1899); *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 435 (1932); *O'Donoghue v. United States*, 289 U. S. 516, 547 (1933).

The fact is that the national power of Congress over the District does not spring from Article I, Section 8 Clause 17, but rather it is the same power which Congress has over all of the United States, that is, that which is given it under all of the provisions of the Constitution.[15] This national power is carved from the general mass of legislative powers originally possessed individually by the States.

On the other hand, the local power which Congress has over the District under Art. 1, § 8, Cl. 17 is analogous to the power possessed by a state over its citizens. That it is local becomes clear when we consider the fact that the District was carved out of the territory formerly belonging to the States of Maryland and Virginia, and, as provided in Clause 17, by the cession of these two States. Although prior to the cession, Congress possessed national power over that exact area, it had no local power over it. The cession pursuant to Article I, § 8, Cl. 17 stripped Maryland and

[15] The remarks of Chief Justice Marshall in *Cohens v. Virginia*, *supra*, that Congress has the power to pursue a felon into a State without the necessity of demanding him from the executive power of the State clearly demonstrates that he was speaking of the national powers of Congress in the sense outlined above, for certainly the right of the United States to pursue one who has committed a crime against the United States is not limited to crimes committed in places ceded by a State. This right is operative throughout the entire United States, the District of Columbia and the Territories. (See brief of The United States at p. 34.)

Virginia of all their power over the ceded territory and vested it exclusively in Congress. At that point, the national power which Congress had theretofore possessed was implemented by those additional powers which Maryland and Virginia alone had formerly possessed. It received no greater powers, however, since Maryland and Virginia had none other to give. See *U. S. v. Curtiss Wright Corp.*, 299 U. S. 304, 315 (1936).

Thus, if in passing the Act of 1940, Congress purported to act under Article I, § 8, Cl. 17, it exceeded the authority granted it by that clause. If, however, it acted under its national powers received from the other provisions of the Constitution, then it was likewise limited by those other provisions. One of those other provisions is Article III, Section 2 which, we say, forbids such legislation.[18]

In *O'Donoghue v. United States*, 289 U. S. 516 (1933), Justice Sutherland held that prior to the cession of the territory comprising the District, Congress was empowered to create Article III courts in Maryland and Virginia. And the courts of the District, following the cession, were, therefore, held to be constitutional courts. But, he said, since Congress now has additional power over the District equivalent to that which Maryland and Virginia formerly had, then it could create courts and give them every power that Maryland and Virginia could give its courts. Congress, he said:

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[18] The national power of Congress over the District is analagous to its national power over aliens. Yet, though Congress has the supreme and complete power to legislate for and to protect aliens within the United States and to define their status and privileges (*Hines v. Davidowitz*, 312 U. S. 52 (1941)), it cannot vest the Federal Courts in the States with jurisdiction of suits between aliens since such jurisdiction is not authorized by Art. III, Sec. 2. *Hodgson v. Bowerbank*, 5 Cr. 303 (1809); *Montalet v. Murray*, 4 Cr. 46 (1807); *Bailiff v. Tipping*, 2 Cr. 406 (1805).

> " * * * has as much power to vest courts of the District with a variety of jurisdiction and powers as a state legislature in conferring jurisdiction on its courts" (p. 545).

Thus, while Congress, in creating courts to sit in the District, may invest those courts with a further grant of diversity jurisdiction than is authorized by Article III, Section 2, it may not do so with the District Courts in the States, for Congress may not invest such courts outside the District with any jurisdiction not ceded to it by the States under Article III, Section 2. See *United States v. Hudson and Goodwin*, 7 Cr. 32 (1812); Ex parte *Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Kellar v. Potomac Elec. Co.*, 261 U. S. 428, 442 (1923); *Kendall v. United States*, 12 Pet. 524, 619 (1838); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693 (1927); *Kline v. Burke Construction Co.*, 260 U. S. 226, 234 (1922).[17]

Although, as pointed out in *Cohens v. Virginia, supra*, Congress may in certain instances enact legislation for the District which will affect other parts of the United States, yet it is necessary that such legislation have a national purpose which Congress is authorized to effect under other parts of the Constitution. As was said by Chief Justice Marshall at p. 429:

> "Whether any particular law be designed to operate without the District or not, depends on the words of that law. If it be designed so to operate, then the

[17] It has long been held that non-Art. III diversity power may not be given to constitutional courts. See *Hodgson v. Bowerbank*, 5 Cr. 303 (1809); 1 Moore, *Federal Practice* (1938) Sec. 0.08; Note (1946) 55 Y. L. J. 600. Petitioner and the United States assert that Congress may invest the federal courts in the States with non-Art. III judicial power. This may be true so long as such additional power is confined to federal "causes of action". But a case is not a federal "cause of action" simply because a citizen of the District is a party. See argument, *infra*, pp. 35-36.

question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument."

The mere fact that a citizen of the District will be affected does not make the purpose a national one.[18] The Chief Justice indicated clearly the scope of the national power over the District when he said in the *Cohens* case (p. 445):

> "Had Congress intended to establish a lottery for those improvements in the City which are deemed national, the lottery itself would have become the subject of legislative consideration."

And, he continued (p. 447):

> "We very readily admit, that the act establishing the seat of government, and the act appointing commissioners to superintend the public buildings, are laws of universal obligation. We admit, too, that the laws of any State to defeat the loan authorized by Congress, would have been void, as would have been any attempt to arrest the progress of the canal, or of any other measure which Congress may adopt. These, and all other laws relative to the District, have the authority which may be claimed by other acts of the national legislature; but their extent is to be determined by those rules of construction which are applicable to all laws. * * * "

And irrespective of the light in which the *Cohens* case is considered, we submit that this court has clearly ruled

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[18] Indeed such a contention would mean that every excise tax imposed upon the citizens of the District contravenes Art. I, Sec. 8, Cl. 1 (which provides that all "Excises shall be uniform throughout the United States"), and is therefore invalid. For if Congress in imposing such excise taxes is acting as a national and not as a local governing body, then it can lay such taxes on the District citizens if, and only if, it imposes a like tax on all of the other citizens of the United States. Cf.: *Binns v. United States*, 194 U. S. 486, 494 (1904); *Lawrence v. Wardell*, 273 Fed. 405, 408 (C. C. A. 9th, 1921); *Gibbons v. Dis. of Col.*, 116 U. S. 404 (1886).

in *O'Donoghue v. United States*, 289 U. S. 516, 546 (1933), that Art. I, §8, Cl. 17, does not empower Congress to extend the diversity jurisdiction of the Federal Courts outside of the District of Columbia beyond the grant contained in Art. III, Sec. 2. Justice Sutherland plainly announced that "in creating and defining the jurisdiction of the courts of the District, Congress (is not) limited to Art. III, as it is in dealing with the other federal courts." And in concluding that the courts of the District were both constitutional and legislative, he said:

> "Since Congress, then, has the same power under Art. III of the Constitution to ordain and establish inferior federal courts in the District of Columbia as in the States, whether it has done so in any particular instance depends upon the same inquiry — Does the judicial power conferred extend to the cases enumerated in that article? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, Section 8, Cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere."

And further the court specifically held at page 547 that when Congress vested the Courts of the District with jurisdiction "not permissible under Article 3", it did so in the exercise of its power as a sovereign state under the provision of section 8 of Article I, noting that it could not impose such additional jurisdiction upon "other like courts functioning *outside* the District." (Italics added.)[19]

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[19] See further: *Kendall v. United States*, 12 Pet. 524, 619 (1838); *Postum Cereal Co. v. California Fig-Nut Co.*, 272 U. S. 693, 700 (1927); *Ex Parte Bakelite Corp.*, 279 U. S. 438, 449 (1929); *Williams v. United States*, 289 U. S. 553, 565 (1933).

Petitioner and the United States suggest that these remarks do not preclude the constitutional courts in the States from exercising judicial functions other than those enumerated in Art. III, Sec. 2. Citing *Williams v. U. S.*, 289 U. S. 553 (1933). While we recognize that this Court indicated in the *Williams* case[20] that such courts may judicially try certain cases which are not strictly Art. III, Sec. 2 suits, nevertheless this further grant of jurisdiction, as noted in the companion case of *O'Donoghue v. U. S.*, 289 U. S. 516 (1933), is expressly confined to *federal* as distinguished from *private* "causes of action". For Justice Sutherland said at p. 545:

> "The fact that Congress, under another and plenary grant of power, has conferred upon these courts jurisdiction over *non-federal causes of action*, or over quasi-judicial or administrative matters does not affect the question. In dealing with the District, Congress possesses the powers which belong to it in respect of territory within a state, and also the powers of a state. *Keller v. Potomac Elec. Co.*, 261 U. S. 428, 442-443. 'In other words * * * it possesses a dual authority over the District and may clothe the courts of the District not only with the *jurisdiction* and powers of federal courts in the several states but with such authority as a state may confer on her courts * * *.'" (Italics added.)

It is therefore apparent that the additional jurisdiction which can be conferred on the District Courts in the States is limited to litigation where a substantial federal interest is involved. Those cases, of course, are excluded which concern simply the adjudication of rights of private parties, and this is so even though one of the parties is a citizen of the District. The action obviously does not become a

[20] Cf. *United States v. Pfitsch*, 256 U. S. 547, 550 (1921); United States v. Sherwood, 312 U. S. 584, 591 (1941).

federal one simply because a citizen of the District is a party.[21]

A. Other Reasons for Holding Article I, §8, Cl. 17 Does Not Sustain the Act of 1940.

Even assuming, *arguendo*, that Article I, §8, Cl. 17 empowers Congress to legislate for District citizens irrespective of geographic boundaries and that it may, therefore, invest the Federal Courts in the States with jurisdiction to hear suits between citizens of the District, we nevertheless contend that Congress may not establish like courts to entertain suits to which a citizen of the District and a citizen of a State are parties. The advocates of the 1940 Act have completely ignored the salient point that the Act not only grants benefits to and imposes burdens upon the citizens of the District, but it operates in a like respect upon citizens of the States. That is, it would require citizens of the States to defend suits instituted by citizens of the District in the various district courts (as in the case at bar) and it would also permit a citizen of a State to sue a citizen of the District in those same courts. Congress, in the absence of a proper Constitutional amendment, is without power to impose these benefits and burdens upon the citizens of the States, for Article III, Sec. 2, clearly limits the Federal diversity jurisdiction, at least insofar as citizens of

[21] Cf.: *American National Bank of Washington v. Tappan*, 217 U. S. 600 (1910); *Bankers Trust Co. v. Tex. & Pac. Ry.*, 241 U. S. 295, 303 (1916). To accept the view of petitioner and United States would render inconsistent the two opinions of Justice Sutherland in the *O'Donoghue* and *Williams* cases, *supra*, which were written in conjunction with one another. Furthermore, if an action is considered federal because a District citizen is a party, would not an action between aliens, over whom Congress has plenary power (*Hines v. Davidowitz*, 312 U. S. 52, 66 (1912)), likewise be a federal action? But an attempt to give the federal courts in the States jurisdiction over cases in which aliens alone were parties has been held beyond the Congressional power. *Hodgson v. Bowerbank*, 5 Cr. 303, 304 (1809).

States are concerned, to those cases where a citizen of a "State" is opposed to a citizen of another "State". And for this reason alone, the Act of 1940 must fall. This fatal defect was aptly noted by the Court in *Central States Co-ops v. Watson Bros. Transportation Co.*, 165 F. (2d) 392, 397 (1947). There it was said:

> "* * * the reach of its terms (Act of 1940) is not confined to the citizens of the District of Columbia but includes with equal effect the citizens of all the States. It is hardly conceivable that Congress, broad as its powers may be with reference to the District of Columbia, can under the claim of exercising such powers legislate for the entire nation. Especially is this so concerning the judiciary where its power is expressly limited by Art. III;"[22]

[22] Much stress has been placed upon the statement of Judge Parker in his dissent below (R. 21) "that if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts * * * or the United States Court for China * * * there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District." The point has been overlooked, however, that a United States consular court cannot render a judgment against a person of foreign birth, not a citizen of the United States (11 Op. Atty. Gen. 474 (1866)), or that the China Courts are without power to enter judgment in favor of a United States citizen against a citizen of China. *Wulfsohn v. Russo-Asiatic Bank*, 11 F. (2d) 715, 717 (C. C. A. China 1926); 7 Op. Atty. Gen. 496 (1855). This very circumstance is, as we have already mentioned, the conclusive fatal defect in the Act of 1940. For, the plenary power of Congress to create courts to hear suits to which a citizen of the District is a party being like the plenary power of Congress over the creation of consular and the China Courts, Congress cannot empower the former courts to hear suits and enter judgments in favor of a citizen of the District against a citizen of a State, without the consent of the States, which is the exact situation in the case at bar. The jurisdiction of a consular court extends only to that authorized by the treaty with the particular foreign power. See, for example, U. S. C., title 22, §183 (Consular Court in Persia). It should be noted that under the treaty with China, dated Jan. 11, 1943 (57 Stat. 767, 768), the China Courts have been abolished.

And the objection is even more far reaching. For, if it is decided that Congress has the power under Art. I, § 8, Cl. 17 to invest the Federal Courts in the States with the jurisdiction attempted to be conferred, then Congress likewise has the power under that same section to give those courts jurisdiction in any case where one of the litigants is a citizen of the District. And if Congress should so act, then it would follow that a citizen of Maryland could sue another citizen of Maryland in the Federal District Courts by the simple expedient of bringing in as a party defendant a citizen of the District of Columbia. And likewise, a Maryland defendant sued by a Maryland Plaintiff in a State Court could remove to the Federal Court by impleading as a third party defendant one who is a citizen of the District of Columbia. Such a result would be opposed to the suggested constitutional construction of the diversity clause that all parties on one side must be of citizenship diverse to those on the other side. *Treinies v. Sunshine Mining Co.*, 308 U. S. 66 (1939).

Again, however desirable it may be to afford District citizens access to the State Federal Courts, we are convinced that to hold that it is proper to do so under the Art. I, § 8, Cl. 17 theory would completely strip the State courts of jurisdiction over every case in which a citizen of the District is opposed to a citizen of a State. The power which Congress has over the District under that clause is "exclusive" and the least that can be said is that when Congress undertakes to act under that clause, the States are completely ousted of every jurisdiction and power they formerly possessed. Alexander Hamilton in *The Federalist* (No. XXXII) expressed this view with respect to this very clause. In that paper he assured the citizenry of New York that upon the adoption of the Constitution the State governments would retain all the rights of sovereignty which

they had previously had and which were not, by that act, exclusively delegated to the United States." "This exclusive delegation, or rather this alienation of state sovereignty", he said, "would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the union; where it granted an authority in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority to the union, to which a similar authority in the states would be absolutely and totally contradictory and repugnant. I use these terms", he continued, "to distinguish this last case from another which might appear to resemble it, but which would, in fact, be essentially different: I mean where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of Constitutional authority". And in explaining the first grant of "exclusive" authority, he said: "the last clause but one in the eighth section of the first article provides expressly, that Congress shall exercise 'exclusive legislation' over the district to be appropriated as the seat of government."

And Mr. John Marshall, later Chief Justice, made the same comment in the Virginia debates on the Constitution.[23] In explaining that there was power in both Congress and the States to call forth the militia, he distinguished such concurrent power from an exclusive grant of power to Congress by saying:

[23] Elliot's *Debates on the Federal Constitution*, Vol. 3, p. 419. And see Chief Justice Marshall's statement in *Sturges v. Crowninshield*, 4 Wheat. 122, 193 (1819) that: "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures, as if they had been expressly forbidden to act on it."

> "The exclusive power of legislating given them within the ten miles square is exclusive of the states, because it is expressed to be exclusive."

It is perfectly clear, therefore, that if Congress in passing the Act of 1940 has exercised a valid grant of power given it by Art. I, § 8, Cl. 17, it has from that very moment, at least, divested the State courts of jurisdiction over suits to which citizens of the District and citizens of a State are parties. Indeed, we would go even further and suggest that in that event, since Congress has had this exclusive power from the very inception of the Constitution, the State courts have never had jurisdiction over citizens of the District and every judgment rendered by those courts in cases to which such a citizen has been a party is void.[24] And would it not also follow that, since the State courts are without jurisdiction, there are even now many instances where no courts are available to the District citizens. The Act of 1940 purports only to grant jurisdiction in cases where a citizen of the District and a citizen of a State are involved. It does not encompass those cases where the action is solely between citizens of the District; nor does it provide a forum for the District citizens where the amount

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[24] See concurrence of the United States in this view at 33 of its brief *Amicus Curiae*. Cf.: *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948) Art. I, Sec. 8, Cl. 17 also gives Congress similar exclusive power over forts, arsenals, dock-yards, etc. And it has been consistently held that the courts or legislatures of the States are without any power or jurisdiction to in any way affect such places. See *Western Union Telegraph Co. v. Chiles*, 214 U. S. 274 (1909); *Surplus Trading Co. v. Cook*, 281 U. S. 647, 652 (1930) ("'Exclusive legislation' is consistent only with exclusive jurisdiction"); *Ohio v. Thomas*, 173 U. S. 276, 281 (1899) ("the State Court had no jurisdiction to try the appellee"). *Quaere:* If Clause 17 is authority for the 1940 Act, might not Congress also legislate in the same manner with respect to residents of forts, arsenals, docks, etc. under the exclusive legislative power granted by that same clause over those places? And then might it not go even further and grant Federal jurisdiction in all those cases where certain federal employees are parties? Where will the line be drawn?

involved is less than $3,000 exclusive of interest and costs. Suffice it to say, the absurdity of these results makes it overwhelmingly clear that Art. I, § 8, Cl. 17 cannot sustain the Act of 1940.

Is is not undeniably clear, therefore, that the Act of April 20, 1940, is unconstitutional insofar as it attempts to extend the jurisdiction of the Federal District Court of Maryland to include suits between a citizen of the District of Columbia and a citizen of a State. Certainly, as we have shown, the Act cannot be supported under the theory that the District of Columbia is included in the term "States" in the diversity clause of Article III. We repeat that if Congress deems it unfair that citizens of the District may not litigate in the Federal Courts of the States, then let it propose an amendment to Art. III of the Constitution to care for that exigency.

As to the theory that Art. I, §8, Cl. 17,[25] will sustain the Act in question, we submit that the debates on the Constitution, as well as the unanimous decisions of this Court, demonstrate the limited scope of Congress' power thereunder. And an even stronger objection to an acceptance of the construction urged by Petitioner appears to be the repercussions which would result therefrom. Many grave constitutional questions would be sure to arise, e.g., the lack of jurisdiction of State courts in cases involving citi-

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[25] In our view the necessary and proper clause (Art. I, §8, Cl. 18) would be applicable only in the event that it should be decided that either Art. III or Art. I, §8, Cl. 17 supports the Act of April 20, 1940. Clause 18 is not a delegation of power in excess of those powers granted by other parts of the Constitution. That clause merely comes in aid of those other powers. If the Act of 1940 is not authorized under Art. III or Art. I, §8, Cl. 17, then the necessary and proper clause adds nothing to Petitioner's case. See *Legal Tender Cases*, 12 Wall. 457, 543 (1871); Alexander Hamilton, The Federalist, No. XXXIII.

zens of the District, and the power of Congress to impose excise taxes on those citizens while not imposing like taxes on all of the other citizens of the United States. And too, if Congress has the sweeping power claimed under Clause 17, what will prevent it from declaring that District citizens may vote since "justice and equality" dictate that they should be afforded representation in Congress as well as a voice in the election of the President. The dangers of construing this clause as being a grant of such unlimited power remind us of the grave doubts of many of our forefathers as to the propriety of including this clause in the Constitution without words of negation.

CONCLUSION

For the aforegoing reasons, it is respectfully submitted that the Act of April 20, 1940, should be held unconstitutional and that the judgment below should accordingly be affirmed.

Respectfully submitted,

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No. 640

In the Supreme Court of the United States

OCTOBER TERM, 1947

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

v.

BIDWELL TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VERMONT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 640

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This suit involves the constitutionality of the Act of April 20, 1940 (c. 117, 54 Stat. 143), an act extending the jurisdiction of the federal district courts to suits between citizens of the District of Columbia, the Territory of Hawaii, or the Territory of Alaska, on the one hand, and citizens of any state or territory, on the other. The court below held the statute unconstitutional, and petitioner has filed a petition for a writ of certiorari to review that holding. The Solicitor General, on behalf of the United States, respectfully urges

that certiorari issue so that this Court may finally resolve the important constitutional question involved.

STATEMENT

This action was commenced by petitioner in the District Court of the United States for the District of Maryland, to recover the sum of $10,000, allegedly owing by respondent under the terms of a certain insurance contract. The complaint (R. 1–5) alleges that petitioner is a corporation incorporated under the laws of the District of Columbia, and respondent a corporation of the State of Virginia duly authorized and licensed to transact business in the State of Maryland (R. 1); that petitioner, as insurer, executed and delivered the insurance policy in question and filed a certificate thereof with the Interstate Commerce Commission, in compliance with Section II of the Interstate Commerce Act, as amended (*ibid.*); that an endorsement attached to the policy provided that respondent, the insured, reimburse petitioner for any payment made on account of any accident, claim, or suit involving a breach of the terms of the policy (R. 1–2); that petitioner was required to make certain payments because of such a breach by respondent (R. 2–4); and that respondent is liable for reimbursement of those sums to petitioner (R. 4). The jurisdiction of the district court is based upon 28 U. S. C. 41 (1) (R. 1).

On respondent's motion to dismiss the complaint (R. 5), the district court entered an order dismissing the complaint for lack of jurisdiction, the Act of April 20, 1940, being held "unconstitutional to the extent that it amends Section 41 (1) (b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States" (R. 6). On appeal to the United States Circuit Court of Appeals for the Fourth Circuit, the judgment of the district court was affirmed, Senior Circuit Judge Parker dissenting (R. 22; 165 F. 2d 531).

The majority opinion, holding the Act of April 20, 1940 unconstitutional, was grounded on the following rationale (R. 10–18): (1) Congress, in enacting the 1940 statute, must be deemed to have acted exclusively under Article III, section 2 of the Constitution. (2) The District of Columbia, however, is not a "state" within the meaning of that term as used in Article III. (3) Consequently, Congress, acting under that article, had no power to vest the district courts with jurisdiction over civil actions based on the fact that some of the litigants are citizens of the District. (4) Moreover, even if Congress were presumed to have acted under Article I, section 8 (17) of the Constitution, the Act of April 20, 1940 is invalid. (5) This is so because the legislative power of Congress over the District of Columbia, though plenary and far-reaching, is to a very great extent

territorially limited to the District. (6) Moreover, Congress cannot, under the guise of exercising that power, extend the jurisdiction of the district courts beyond the limits of judicial power defined by Article III.

The dissent of Judge Parker, on the contrary, although agreeing that it was well settled that the District of Columbia is not a state within the meaning of the Constitution and that Article III, consequently, would not support the 1940 Act, urged its approval as a valid exercise of the congressional power under Article 1, section 8 (17) and (18) of the Constitution. Judge Parker was of the following view (R. 18–22): (1) Article III does not express the full authority of Congress to create courts, and Congress, acting under Article I, section 8 (17), may establish courts to hear any litigation to which a citizen of the District of Columbia is a party. (2) Such courts may be vested with the same judicial power as is vested in the federal courts created under Article III. (3) On like principle, Congress may vest in Article III courts, the judicial power which it is authorized to confer on courts established under Article I, section 8 (17). (4) The congressional power over the District of Columbia is not limited to the confines of the District. (5) Moreover, since Congress could authorize courts which it might create under that power to sit and their process to run anywhere in the country, there is

no reason why it cannot combine the jurisdiction of such courts with that of the district courts already created under Article III. (6) Such a holding is in harmony with the primary duty of the Government to secure justice for its citizens by assuring them access to an impartial judiciary.

On March 3, 1948, petitioner filed its petition for a writ of certiorari.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Act of April 20, 1940 (c. 117, 54 Stat. 143) reads as follows:[1]

> * * * That clause (b) of paragraph (1), section 24, of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 41; Supp. IV, title 28, sec. 41), be, and the same is hereby, amended to read as follows:
>
> (b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State of Territory.

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[1] 28 U. S. C. (41 (1)), as amended by the 1940 statute, reads, in pertinent part, as follows:

* * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or * * * is between citizens of a State and foreign States, citizens or subjects. * * *

(2) Article I, Section 8, of the Constitution of the United States, reads, in pertinent part, as follows:

> Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And
>
> Cl. 18. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(3) Article III, Section 1 of the Constitution of the United States, reads as follows:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article III, Section 2, Clause 1 of the Constitution of the United States reads as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

DISCUSSION

1. As the Circuit Court of Appeals for the Seventh Circuit put it, in its recent opinion in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392, the Act of April 20, 1940, has afforded the federal courts "a 'field day' in constitutional erudition" (*id* at 395). Since the enactment of the statute, eleven district courts and two circuit courts of appeal have had occasion to pass on its constitutionality.

Three of these, all district courts, have upheld the Act; the remainder have rejected it.[2]

An act of Congress should not, however, be set aside as invalid without, first, a full consideration by this Court. And this is the first time that the issue has been presented to the Court. It is submitted, therefore, that the petition for a writ of certiorari should be granted so that the question may finally be resolved here.

2. By the Act of April 20, 1940, Congress sought to remove a discrimination to which the citizens of the District of Columbia had been subjected since 1805, when, in *Hepburn and Dundas* v. *Ellzey*, 2 Cr. 445, the Supreme Court held that

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[2] The Act has been upheld in *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.); *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif.); and *Duze* v. *Woolley*, 72 F. Supp. 422 (D. Hawaii).

It has been declared unconstitutional not only by the district court and the circuit court of appeals in the instant case, but also in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392; *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa); *Behlert* v. *James Foundation*, 60 F. Supp. 706 (S. D. N. Y.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Willis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); see, also, *Federal Deposit Insur. Corp.* v. *George-Howard*, 55 F. Supp. 921 (W. D. Mo.), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8), certiorari denied, 329 U. S. 719.

The statute is also involved in an appeal now pending on second reargument in the Third Circuit Court of Appeals (*Van Sant* v. *American Express Co.*, No. 9044), where the United States has intervened in support of the legislation.

Congress had denied to them the access to the federal courts on grounds of diversity of citizenship which was available to the citizens of the states proper. Thus, Congress had deprived the citizens of the federal district of that forum—free from the supposed prejudices of the local courts against citizens of other, "foreign" states—which the Constitution had provided and Congress had supplied to citizens in general and, indeed, even to aliens. *Serè* v. *Pitot*, 6 Cr. 332, 337–338; *Bank of the United States* v. *Deveaux*, 5 Cr. 61, 87.

In the *Ellzey case*, the Court held that the jurisdiction conferred by the Judiciary Act of 1789 (1 Stat. 73, 78) on the circuit courts therein created, in cases between "a citizen of the State where the suit is brought, and a citizen of another State," did not contemplate suits between citizens of the District of Columbia and citizens of the states proper. 2 Cr. at 452. However, the decision, although sometimes read as announcing a rule of constitutional law (see *Hooe* v. *Jamieson*, 166 U. S. 395, 396–397; *O'Donoghue* v. *United States*, 299 U. S. 516, 543), decided no more than that the 1789 statute did not permit such suits. It did not hold that Congress might not authorize such actions by new legislation. Certainly, a study of the historical materials discloses no authority for so limiting the judicial power vested in Congress by Article III of the Constitution. The term

"state" might have been so used in the Judiciary Act of 1789 as to exclude the District of Columbia, but it is by no means necessarily true that it had been used in any equally restricted sense in the Constitution. See *Towne* v. *Eisner*, 245 U. S. 418, 425; *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, 71–72; Holmes, J., dissenting in *Eisner* v. *Macomber*, 252 U. S. 189, 219; and Brandeis, J., dissenting, *id.* at 234. Thus, in other connections, this Court has treated the District as a "state" within the meaning of that term as used in the Constitution. *Stoutenburgh* v. *Hennick*, 129 U. S. 141 (regulation of commerce "among the several states"); *Embry* v. *Palmer*, 107 U. S. 3 (full faith and credit to judicial proceedings of "every other state"); see, also, *Geofroy* v. *Riggs*, 133 U. S. 258; *Downes* v. *Bidwell*, 182 U. S. 244, 354–355 (Fuller, C. J., dissenting); *Grether* v. *Wright*, 75 Fed. 742, 753 (C. C. A. 6) (per Taft, C. J.); *Watson* v. *Brooks*, 13 Fed. 540, 543–544 (C. C. D. Ore.).

The District of Columbia has grown from a partially rural community of 14,093 persons in 1800 to an exclusively urban metropolis with a population of 663,091 in 1940; and of these residents in 1940, some 652,[illegible]00 were citizens of the United States.[1] Its citizens now trade and travel

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[1] U. S. Department of Commerce, *Sixteenth Census of United States, 1940, Population*, Vol. II (1), pp. 955, 960. There are no reliable statistics as to the number of permanent domiciliaries in the District. *The Washington Post*, in

throughout the United States and every day engage in numerous transactions with citizens of the states proper. It is only meet that they too, as well as the citizens of the states proper, should be permitted to sue in the independent federal courts.

3. Whatever the force of the *Ellzey* decision, however, it is plain that the Act of April 20, 1940, can be supported by constitutional grants of power other than those in Article III. When Chief Justice Marshall announced the *Ellzey* rule in 1805, he stated that the discrimination against

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connection with a recent survey of opinion in the District on local self-government, polled adults in 400 families, selected as a "random area sample of households" on a basis similar to that used by the Census Bureau and the Bureau of Labor Statistics, and determined that the following percentages of the sample had resided in the District of Columbia for these periods:

Percent of sample	*No. of years in District*
2	less than 1 year
14	1 year but less than 5 years
20	5 years but less than 10 years
43	more than 10 years
21	native born

(*The Washington Post*, Sunday, February 1, 1948.)

The Office of the Collector of Taxes for the District of Columbia advises us that approximately 120,000 income tax returns were filed by individual taxpayers in 1947, of which approximately half were joint returns; and that about 4,500 returns were filed by corporations in that year, of which about 1,600 were filed by domestic corporations.

Of course, in addition to the District's citizens, the decision below affects the rights of the 423,330 residents of the Territory of Hawaii and the 72,524 residents of the Territory of Alaska. U. S. Department of Commerce, *op. cit.*, Vol. I, pp. 1191, 1209.

District of Columbia citizens which it required could be remedied by appropriate legislation (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. *But this is a subject for legislative, not for judicial consideration.* [Italics supplied.]

The Act of April 20, 1940, is the response to the Court's invitation (H. Rep. No. 1756, 76th Cong., 2d sess.)

The enlargement of the district courts' jurisdiction to encompass suits between citizens of the District of Columbia and citizens of the States proper was posited on the plenary power over the District conferred upon Congress by Article I, section 8 (17) and (18), *ibid.* It is the Government's position that those provisions afford ample authority for the legislation.

Article III "does not express the full authority of Congress to create courts." *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. And among the extra-Article III sources of authority to create "legislative" or "statutory" federal courts, as distinguished from the so-called "constitutional courts" (see *American Insurance Co.* v. *Canter*, 1 Pet. 511; *Ex parte Bakelite Corp.*, 279 U. S. 438; *Wil-*

liams v. *United States*, 289 U. S. 553) is the power of exclusive legislation over the District of Columbia. *O'Donoghue* v. *United States*, 289 U. S. 516, 545–548; and see also *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442–443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693. By virtue of that power over the District, Congress may make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts. *O'Donoghue* v. *United States*, 289 U. S. 516, 540–541. On like principle, we submit, it may enable its citizens to resort to the "constitutional" federal courts already created in the states proper.

The court below suggests that this plenary power of Congress over the federal district is limited territorially to the District boundaries. Any such endeavor so to restrict that vital power must fail, however, in light of the opinion read by Chief Justice Marshall, in *Cohens* v. *Virginia*, 6 Wheat. 264. It was there that this Court first boldly announced the broad sweep of the plenary power over the District of Columbia, which, like all other powers conferred by the Constitution upon Congress, is intended to be exercised as a national power by a national legislature, rather than as a local function by a municipal assembly. See *Cohens* v. *Virginia*, 6 Wheat. at 424–429, *passim*; see, also, *Embry* v. *Palmer*, 107 U. S. 3; *Neild* v. *District of Columbia*, 110 F. 2d 246, 250, 251 (App. D. C.);

This full measure of congressional power over the District has never been curtailed.

There is no more force to the contention of the majority below that the Act of April 20, 1940, must fail because it requires a merger in the federal district courts of judicial functions incidental to the exercise of Article I powers with such as are defined in Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the "constitutional" courts of the District of Columbia. There is no reason why a similar merger should not also be appropriate for the federal courts in the states proper. Whatever the validity of the rule prohibiting the vesting of *legislative* or *administrative* functions in the so-called "constitutional" courts (other than those of the District of Columbia: see *Williams* v. *United States*, 289 U. S. 553, 565–567), the merger of *judicial* functions derived from Article III with *judicial* functions derived from other sections of the Constitution is in all respects proper. Indeed, to hold such a merger unauthorized would be, in effect, to deny the numerous grants of jurisdiction to the federal district courts to hear suits against the United States; for the adjudication of claims against the Government, although a judicial function, is outside the definition of the judicial power in Article III. *Williams* v. *United States*, 289 U. S. 553, 572–581. The entertainment of just such non-Article III suits against the Government by the federal dis-

trict courts in the forty-eight states has, of course, long been recognized and approved by this Court. See, for example, *United States* v. *Sherwood*, 312 U. S. 584; *United States* v. *Pfitsch*, 256 U. S. 547.

4. When the Constitution was drafted and when it was ratified, there was no federal district. The citizens who subsequently, in 1801, became citizens of the newly created District of Columbia[4] were at that time citizens of the States of Maryland and Virginia. Only later were the lands upon which these citizens resided ceded to the National Government. As this Court has said in another but closely related connection, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States*, 289 U. S. 516, 540; see, also, *Downes* v. *Bidwell*, 182 U. S. 244, 260–261.

The holding, in 1805, that the District's citizens were barred from federal courts open not only to their Maryland and Virginia neighbors, but to all aliens, even those residing in the District of Columbia, was an "extraordinary" decision. *Hepburn and Dundas* v. *Ellzey*, 2 Cr. 445, 453.

[4] For a narrative account of the organization of the District, see *Morris* v. *United States*, 174 U. S. 196.

To hold, as the court below does, that the legislative action invited by *Ellzey* is futile to remedy the discrimination long suffered by the inhabitants of the District, is completely unjustifiable.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted and that, on review, the judgment below should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

MARCH 1948.

No. 89

In the Supreme Court of the United States

OCTOBER TERM, 1943

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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Miscellaneous—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER

v.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The District Court of the United States for the District of Maryland did not announce any opinion. The majority and dissenting opinions of the United States Circuit Court of Appeals for the Fourth Circuit (R. 10–22) are reported at 165 F. 2d 531.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 31, 1947 (R. 22). The petition for a writ of certiorari was filed on

March 3, 1948, and granted on March 29, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended (now 28 U. S. C. 1254).

QUESTION PRESENTED

Whether the Act of April 20, 1940, c. 117, 54 Stat. 143, to the extent that it amended Section 24 (1) (b) of the Judicial Code (28 U. S. C. 41 (1) (b)) so as to vest in the district courts of the United States jurisdiction of suits of a civil nature "between citizens of the District of Columbia, * * * and any State or Territory," was a constitutional enactment.[1]

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[1] On June 25, 1948, after certiorari had been granted here, the Act of April 20, 1940, and Section 24 (1) (b) of the Judicial Code were repealed (P. L. 773, 80th Cong., 2d sess., sec. 39) and the pertinent provisions of the Code revised to read as follows (*id.*, sec. 1, § 1332):

"§ 1332. Diversity of citizenship; amount in controversy

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) Citizens of different States;

(2) Citizens of a State, and foreign states or citizens or subjects thereof;

(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) The word "States," as used in this section, includes the Territories and the District of Columbia."

The provisions of the replaced statute, however, continue to govern the rights and liabilities of the parties to this suit (*id.*, sec. 39), and, in any event, the new provisions pose the same constitutional questions as were raised by the 1940 Act.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

(1) The Act of April 20, 1940, c. 117, 54 Stat. 143, reads as follows: [2]

> * * * That clause (b) of paragraph (1), section 24, of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 41; Supp. IV, title 28, sec. 41), be, and the same is hereby, amended to read as follows:
>
> "(b) Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."

(2) Article I, § 8, of the Constitution of the United States reads, in pertinent part, as follows:

The Congress shall have Power * * *

* * * * *

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[2] Section 24 (1) of the Judicial Code (28 U. S. C. (1940 ed.) 41 (1)), as amended by the 1940 statute, read, in pertinent part as follows:

"The district courts shall have original jurisdiction as follows:

"* * * Of all suits of a civil nature, at common law or in equity, * * * where the matter in controvery exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * Is between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory, or * * * is between citizens of a State and foreign States, citizens or subjects. * * *"

As noted, *supra*, n. 1, the entire Section 24 (1) has been repealed, and the pertinent provision of the Code revised (P. L. 773, 80th Cong., 2d sess., secs. 39, 1 (1332)).

Cl. 9. To constitute Tribunals inferior to the supreme Court.

* * * * *

Cl. 17. To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

Cl. 18. To make all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

(3) Article III, § 1 of the Constitution of the United States reads as follows:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

(4) Article III, §2 of the Constitution of the United States reads, in pertinent part, as follows:

> Cl. 1. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

INTEREST OF THE UNITED STATES

The Government takes no position as to the merits of the claims asserted by petitioner and respondent against each other. Its sole interest is to support the validity of the 1940 statute.

STATEMENT

This action was commenced by petitioner in the District Court of the United States for the District of Maryland to recover $10,000, allegedly owing by respondent under the terms of an insurance contract. The complaint (R. 1–5) alleges

that petitioner is a corporation incorporated under the laws of the District of Columbia, and respondent a corporation of the State of Virginia, duly authorized and licensed to transact business in the State of Maryland (R. 1); that petitioner, as insurer, executed and delivered the insurance policy in question and filed a certificate thereof with the Interstate Commerce Commission, in compliance with Section II of the Interstate Commerce Act, as amended (R. 1); that an endorsement attached to the policy provided that respondent, the insured, reimburse petitioner for any payment made "on account of any accident, claim, or suit involving a breach of the terms of the policy" (R. 1-2); that petitioner was required to make certain payments because of such a breach by respondent (R. 2-4); and that respondent is liable for reimbursement of those sums to petitioner (R. 4). The jurisdiction of the District Court was invoked under 28 U. S. C. 41 (1) (R. 1).

On respondent's motion (R. 5), the District Court entered an order dismissing the complaint for lack of jurisdiction, the Act of April 20, 1940, being held "unconstitutional to the extent that it amends Section 41 (1) (b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States" (R. 6). The Circuit Court of Appeals affirmed, Judge Parker dissenting (R. 22; 165 F. 2d 531).

The majority opinion, holding the Act of April 20, 1940, unconstitutional, was grounded on the following rationale (R. 10–18): (1) Congress, in enacting the 1940 statute, must be deemed to have acted exclusively under Article III, § 2 of the Constitution. (2) The District of Columbia, however, is not a "State", within the meaning of that term as used in Article III. (3) Consequently, Congress, acting under that article, had no power to vest the district courts with jurisdiction over civil actions based on the fact that some of the litigants are citizens of the District. (4) Moreover, even if Congress were presumed to have acted under Article I, § 8, cl. 17 of the Constitution, the Act of April 20, 1940, is invalid. (5) This is so because the legislative power of Congress over the District of Columbia, though plenary and far-reaching, is to a very great extent territorially limited to the District. (6) Moreover, Congress cannot, under the guise of exercising that power, extend the jurisdiction of the district courts beyond the limits of judicial power defined by Article III.

The dissent of Judge Parker, on the contrary, although acquiescing in the majority holding that the District of Columbia is not a "State", within the meaning of Article III, urged that the 1940 Act was a valid exercise of the congressional power under Article I, § 8, cls. 17 and 18. Judge Parker's reasoning was as follows (R. 18–22): (1) Article III does not express the full authority

of Congress to create courts, and Congress, acting under Article I, § 8, cl. 17, may establish courts to hear any litigation to which a citizen of the District of Columbia is a party. (2) Such courts may be invested with the same judicial power as is vested in the federal courts created under Article III. (3) On like principle, Congress may vest, in Article III courts, the judicial power which it is authorized to confer on courts established under Article I, § 8, cl. 17. (4) The congressional power over the District of Columbia is not limited to the confines of the District. (5) Moreover, since Congress could authorize courts which it might create under that power to sit and their process to run anywhere in the country, there is no reason why it cannot combine the jurisdiction of such courts with that of the district courts already created under Article III. (6) Such a holding is in harmony with the primary duty of the Government to secure justice for its citizens by assuring them access to an impartial judiciary.

SUMMARY OF ARGUMENT

So far as it pertains to controversies involving citizens of the District of Columbia, the Act of April 20, 1940, may be sustained either (1) under the authority of Article III of the Constitution, or (2) as an appropriate exercise of the plenary power over the federal district conferred by Article I, § 8, cls. 17 and 18.

I

Article III of the Constitution provides that the judicial power of the United States shall be vested in the Supreme Court and in the lower federal courts and shall extend to controversies "between Citizens of different States * * * and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects." There is no proof that the term "State," as there used, was intended to exclude the federal district. Nor is there any logic in reading the District of Columbia out of Article III. The liberality of constitutional construction would support a construction of the word "State" to include the District, and the term has been so read in connection with the application of treaties, statutes, and constitutional provisions other than that here involved.

There is nothing in the diversity clause of the judicial article which requires so strict a construction as to exclude the District from the category of "State." Nor does the ruling of this Court in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, require such an exclusion. Chief Justice Marshall made it clear that the *Hepburn* case involved merely the interpretation of the Judiciary Act of 1789. To be sure, he indicated that the word "State" had the same meaning in that statute as in the Constitution; but, in recognizing the discriminatory result of the decision with respect to citizens of

the District, he nevertheless suggested that "this is a subject for legislative, not for judicial consideration" (p. 453). The 1940 Act, now before the Court, explicitly included citizens of the District and was a belated response to Chief Justice Marshall's suggestion. The question of constitutionality is certainly not foreclosed by the *Hepburn* decision, and every consideration points to its validity.

II

There is a further reason for sustaining the Act of April 20, 1940. The congressional power over the District of Columbia and its citizens which is derived from Article I, § 8, cls. 17 and 18, of the Constitution is sweeping and inclusive in character. In the exercise of that power, Congress has the right to create inferior federal courts for the hearing and determination of controversies affecting citizens of the District. Since the power to legislate for the District clearly includes the power to make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts open to citizens of the States proper, it must be deemed to include also the power to enable the citizens of the District, in those cases in which the Constitution secures a like privilege for the citizens of the States proper, to resort to the federal courts already created in those States.

The plenary power of Congress over the District and its citizens is not confined to the boundaries of the District but may be exercised throughout the territorial limits of the United States. This principle, established early in the nation's history in *Cohens* v. *Virginia*, 6 Wheat. 264, has never been questioned, and the extraterritorial exercise of the plenary power over the District has been approved wherever deemed necessary to its proper execution.

The Act of April 20, 1940, cannot be condemned because it required a merger in the federal district courts of judicial functions incidental to the Article I powers with other judicial functions derived from Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the constitutional courts of the District of Columbia. There is no reason why it should not also be appropriate in the federal courts in the States proper. Whatever the merit of the rule prohibiting the vesting of legislative or administrative functions, as contrasted with judicial functions, in the "constitutional" courts of the nation, that rule plainly does not proscribe the merger of judicial functions in such courts, regardless of the constitutional genesis of such functions. Moreover, to hold such a merger of judicial functions improper would be to condemn the long exercised delegations of power to

the federal district courts to hear suits against the United States, a class of cases which, although judicial in character, has been held outside the pale of judicial power as defined in Article III.

Considerations of policy also support the validity of the Act of April 20, 1940, since it effects a salutary removal of an unfair discrimination against the citizens of the District of Columbia. In *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, Chief Justice Marshall regretfully remarked the discrimination which the Court's construction of the Judiciary Act of 1789 visited upon citizens of the District, and he invited legislative action to remove that discrimination. The Act of April 20, 1940, was Congress' belated response to that invitation. It is only fair that the citizens of the District of Columbia, which has grown into an urban metropolis of 861,000 people, should be afforded the same access to the impartial federal judiciary as is afforded not only to citizens of the States proper but to all aliens, including even those resident in the District of Columbia.

When the Constitution was drafted and when it was ratified, there was no federal district. Those who became citizens of the District thereafter created were at that time citizens of the States of Maryland and Virginia. As this Court has said, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was

intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States*, 289 U. S. 516, 540.

ARGUMENT

The sole issue on this review is the power of Congress to extend the diversity jurisdiction of the United States district courts to cases in which citizens of the District of Columbia are parties. It is our position that Congress has that power under the Constitution and that the Act of April 20, 1940, was a valid exercise of that power. In our view, therefore, the holding below is erroneous and should be set aside.

The Act of April 20, 1940, vested jurisdiction in the federal courts over suits "between citizens of different States, or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."[3] Suits instituted by or against citizens of the District had been held outside the jurisdiction of the federal courts since the decision of this Court, in 1804, in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445. The 1940 Act was designed to end that discrimination. However, of the eleven district courts and two circuit courts of appeals which have had occasion to pass on its constitutionality, only

[3] As noted, *supra*, n. 1, the 1940 Act has now been replaced by sec. 1332 of the revised Judicial Code (P. L. 773, 80th Cong., 2d sess., sec. 1, § 1332).

three, all district courts, have upheld the Act; the remainder have rejected it.[4]

We submit that, so far as it pertains to controversies involving citizens of the District of Columbia, the Act of April 20, 1940, was valid on either of two grounds: *First,* as a proper exercise of the judicial power within Article III of the Constitution; and *second,* as an appropriate exercise of the plenary powers over the federal district delegated to Congress by Article I, § 8, cls. 17 and 18. On either theory, the policy considerations in support of constitutionality are persuasive. For these reasons, we urge that the Act of April 20, 1940, should be sustained as a valid congressional enactment.[5]

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[4] The Act has been upheld in *Winkler* v. *Daniels*, 43 F. Supp. 265 (E. D. Va.); *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925 (N. D. Calif.), and *Duze* v. *Woolley*, 72 F. Supp. 422 (D. Hawaii).

It has been declared unconstitutional not only by the district court and the circuit court of appeals in the instant case, but also in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392 (C. C. A. 7), petition for writ of certiorari filed April 17, 1948, No. 43, this Term; *McGarry* v. *City of Bethlehem*, 45 F. Supp. 385 (E. D. Pa.); *Behlert* v. *James Foundation*, 60 F. Supp. 706 (S. D. N. Y.); *Ostrow* v. *Samuel Brilliant Co.*, 66 F. Supp. 593 (D. Mass.); *Wilson* v. *Guggenheim*, 70 F. Supp. 417 (E. D. S. C.); *Feely* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663 (D. Md.); *Willis* v. *Dennis*, 72 F. Supp. 853 (W. D. Va.); see, also, *Federal Deposit Insur. Corp.* v. *George Howard*, 55 F. Supp. 921 (W. D. Mo.), reversed on other grounds, 153 F. 2d 591 (C. C. A. 8), certiorari denied, 329 U. S. 719.

[5] The legislative history of the 1940 statute is a meager one. Although the Committee on the Judiciary of the

I

The act of April 20, 1940, was authorized by Article III of the Constitution

Article I, § 8, cl. 9 of the Constitution empowers Congress "To constitute Tribunals inferior to the Supreme Court." Article III, § 1, provides that the judicial power of the United States shall be vested in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." Article III, § 2, enumerates the classes of "Cases" and "Controversies" to which that judicial power "shall extend." Among these are controversies "between Citizens of different States * * * and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."[6] The

House of Representatives, in recommending its enactment, fully reported the constitutional questions which it raised (H. Rep. No. 1756, 76th Cong., 3d sess.) and concluded that it was "a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories" (*id.*, p. 3), the constitutional questions were not considered at all in the report of the Senate committee (S. Rept. No. 1399, 76th Cong., 3d sess.), and there was no discussion of the measure whatever on the floor of the House or Senate. See 86 Cong. Reg. 2551, 2756, 3015, 3038, 4163, 4286, 4433, 4463, 4563, 4889.

[6] This is not the place to review the history of the judiciary clauses of the Constitution. For a recent summary account, see Frank, *Historical Bases of the Federal Judicial System*, (1948) 13 Law and Contemporary Problems 3. For particular references to the history of the diversity clause, see Frank, *op cit.*, 14–28; Friendly, *The Historic Basis of Diversity Jurisdiction*, (1928) 41 Harv. L. Rev. 483; Frankfurter,

question here is whether the term "State," as used in Article III, includes the District of Columbia. We submit that it does, and that it has been so treated in a variety of other situations.

Thus, when used in a treaty, the term "State" has been defined to include the District. In *Geofroy* v. *Riggs*, 133 U. S. 258, this Court held that a treaty which referred to "all the States of the Union" comprehended the District of Columbia, and that, under the treaty, French citizens were therefore qualified to inherit property from the District's citizens notwithstanding local laws to the contrary. Again, last Term, in *Hurd* v. *Hodge*, 334 U. S. 24, 31, the Court, in construing Section 1978 of the Revised Statutes, held "the District of Columbia is included within the phrase 'every State and Territory.'" See, also, *Talbott* v. *Silver Bow County Commissioners*, 139 U. S. 438, 444–445; *Downes* v. *Bidwell*, 182 U. S. 244, 258–263, 270; *id.* at 354–355 (Fuller, C. J., dissenting); *Grether* v. *Wright*, 75 Fed. 742, 753 (C. C. A. 6, per Taft, C. J.); *Watson* v. *Brooks*, 13 Fed. 540, 543–544 (C. C. D. Ore.); *Metropolitan R. R. Co.* v. *District of Columbia*, 132 U. S. 1, 9; *Callan* v. *Wilson*, 127

Distribution of Judicial Power Between United States and State Courts, (1928) 13 Corn L. Q. 499; Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, (1931) 79 U. of Pa. L. Rev. 869; Frankfurter and Landis, *The Business of the Supreme Court*, 8–11 (1927).

U. S. 540, 548–550; 6 Op. Atty. Gen. 302, 303-306; cf. *Andres* v. *United States*, 333 U. S. 740.

There is more reason for reading the term as inclusive of the federal district when construction of the Constitution is involved. For, constitutional language will generally be assigned a broader interpretation than that accorded "legislative codes which are subject to continuous revision with the changing course of events." *United States* v. *Classic*, 313 U. S. 299, 316. "Since the Constitution has a broader purpose than a statute and is intended to last for a much longer time, its wording should possess a flexibility which is not needed in a statute." Chafee, *Federal Interpleader Since the Act of 1936*, (1940) 49 Yale L. J. 377, 395. See, also, *Lamar* v. *United States*, 240 U. S. 60, 65; *Towne* v. *Eisner*, 245 U. S. 418, 425; *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66, 71–72; Holmes, J., dissenting in *Eisner* v. *Macomber*, 252 U. S. 189, 219; Brandeis, J., dissenting, *id.*, at 234.

Such an approach in construction is especially appropriate here. The term "State," as it is used in the Constitution, is a particularly ambiguous term. In *Texas* v. *White*, 7 Wall. 700, Chief Justice Chase, referring to that term, said (7 Wall. at 720):

> * * * The poverty of language often compels the employment of terms in quite different significations; and of this hardly any example more signal is to be found

> than in the use of the word we are now considering. It would serve no useful purpose to attempt an enumeration of all the various senses in which it is used. * * *

The word "State," said the Court, "most frequently" denotes "the combined idea * * * of people, territory, and government" (7 Wall. at 721); that is, "the people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government, or united by looser or less definite relations * * *" (*id.*, at 720).

Clearly, the District of Columbia is a "State" within that definition. And merely because it may have been intended that it be excluded from the compass of the term within the constitutional provisions affecting national elections, there is no reason why the District should not be considered a "State" for the purposes of other provisions of the Constitution. It is not unusual for a word to be used with different meanings in the same act, and, likewise, in the Constitution, the same term has been accorded different constructions depending on the connections in which it has been employed. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433–434. "The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function." *Smiley* v. *Holm*, 285 U. S. 355, 365.

The fact is that the federal district has been treated as a "State" in connection with certain

constitutional provisions. Thus, in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, when the Court struck down an act of the Legislative Assembly of the District of Columbia requiring commercial agents soliciting the sale of goods to take out a license, as an unconstitutional regulation of commerce in so far as it applied to agents for persons doing business outside the District, it held, in effect, that commerce between the States proper and the District of Columbia constituted commerce "among the several States," within the meaning of Article I, section 8, cl. 3 of the Constitution. Miller, J., dissenting, 129 U. S. at 150–151. Cf. *Hanley* v. *Kansas City So. Ry. Co.*, 187 U. S. 617; *United States* v. *Whelpley*, 125 Fed. 616 (W. D. Va.). Again, in *Loughborough* v. *Blake*, 5 Wheat. 317, and *Embry* v. *Palmer*, 107 U. S. 3, constitutional provisions affecting "States" were, by extension, made applicable to the District.

There is certainly nothing in the diversity clause of Article III which dictates so strict a construction as to require exclusion of the District of Columbia from the category of "State." The clause has not otherwise been so narrowly applied. A corporation, though not a citizen under the privileges and immunities clause of the Constitution (*Paul* v. *Virginia*, 8 Wall. 168, 177–179; *Pembina Con. Silver Mfg. Co.* v. *Pennsylvania*, 125 U. S. 181 187–188), has been held a citizen

for purposes of diversity jurisdiction. *Louisville etc. Railroad Co.* v. *Letson*, 2 How. 497; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. Rev. 853, 1090–1225; cf. *Bank of the United States* v. *Deveaux*, 5 Cr. 61, 91. And this, despite a considerable opposition to such a construction (see Warren, *New Light on the History of the Federal Judiciary Act of 1789*, (1923) 37 Harv. L. R. 49, 89–90; McGovney, *op. cit., passim*). The revision of the Judicial Code, which Congress has only just completed, views the term "State" in that clause with equal latitude, expressly defining it to include "the Territories and the District of Columbia." P. L. 773, 80th Cong., 2d sess., sec. 1, § 1332 (b). This legislative construction, it is submitted, is entitled to respectful consideration.

Nor is the decision in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, to the contrary. That case involved a construction of the provisions, not of the Constitution, but of the Judiciary Act of 1789, 1 Stat. 73.

In accordance with the authority delegated by Article III of the Constitution, the first Congress had promptly proceeded to the organization of a federal judiciary, and, on September 24, 1789, the Judiciary Act of 1789 was enacted. Among other things, Section 11 of the Act vested in the circuit courts, which it established, "cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in

equity, where the matter in dispute exceeds * * * the sum or value of five hundred dollars, and * * * the suit is between a citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. at 78. In the *Hepburn* case, plaintiffs were citizens and residents of the District of Columbia; defendant was a citizen and inhabitant of Virginia; and the jurisdiction of the federal circuit court was invoked on the basis of a diversity of citizenship of the parties. The question certified to this Court was whether the circuit court was required to dismiss the suit for want of jurisdiction. Chief Justice Marshall made it clear that the answer "depends on the act of congress describing the jurisdiction of that court," which "gives jurisdiction to the circuit courts in cases between a citizen of the state in which the suit is brought, and a citizen of another state" (2 Cr. at 452). In holding that the circuit court was without jurisdiction, he reached the conclusion that the District of Columbia was not a "State." And although he treated the statute as employing the term "State" in the same manner as used in the Constitution, he was nevertheless careful to point out (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary, that the courts of the United States, which are open to aliens, and to the citizens of every state in the

> union, should be closed upon them. *But this is a subject for legislative, not for judicial consideration.* [Italics supplied.]

Strictly confined to its holding, the *Hepburn* case constitutes no more than a construction of Section 11 of the Judiciary Act of 1789. The remarks quoted above support such a narrow reading. And, though the decision has sometimes been taken, more broadly, as announcing a rule of constitutional law (see *New Orleans* v. *Winter*, 1 Wheat. 91, 94; *Hooe* v. *Jamieson*, 166 U. S. 395, 396–397; *Downes* v. *Bidwell*, 182 U. S. 244, 259; *O'Donoghue* v. *United States*, 289 U. S. 516, 543), such a reading would not only disregard Chief Justice Marshall's plain invitation to legislative action but also the well-accepted rule in favor of a liberal construction of constitutional language. See *supra*, p. 17.

Though the legislative history of the 1789 Act discloses no consideration of the particular problem involved in the instant case, one thing is clear: there was considerable opposition to the creation of inferior federal courts and, if they were to be established, to the grant of diversity jurisdiction to such courts. In consequence, before the Act was passed, the broad jurisdiction in diversity cases which Article III contemplated and which had been embodied in the draft bill introduced into the Senate (S. 1, 1st Cong., 1st sess.) had been substantially confined by amendment. See Warren, *New Light on the History of the Federal*

Judiciary Act of 1789; (1923) 37 Harv. L. R. 49, 79.

In such circumstances, it is difficult to justify the assumption which Chief Justice Marshall entertained without question in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, 452, that the term "State" was used in the Judiciary Act in the same sense as it had been employed in Article III of the Constitution. Irrespective of whether the *Hepburn* case be regarded as a correct decision with respect to the construction of the 1789 Act, it certainly should not be enlarged into a rule of constitutional law. And whatever interpretation may have been accorded the case by its contemporaries [8] and by the courts which have since fol-

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[7] Mr. Warren's remark is pertinent in this connection: "it may well be contended that had the Judges of the Supreme Court been familiar * * * with the history of the progress of the Bill in the Congress, several of the leading cases before that Court might have been decided differently." Warren, *op. cit.*, at 51. Cf. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 72–73.

[8] There is considerable doubt whether the lawyers of its day understood the case to enunciate constitutional doctrine, for, if so, one finds it difficult to explain why it elicited no comment in the fervent debate over the status of the District of Columbia which was waging in the Congress of the time. In the second session of the Eighth Congress, resolutions were introduced providing for the retrocession of all portions of the District, other than the City of Washington, to the States of Maryland and Virginia. These resolutions were heatedly debated on January 7–10, 1805. Though there was much comment about the discriminatory treatment meted out to the citizens of the District of Columbia by the then new Constitution, an examination of the

lowed it,[9] the decision has only recently been cited by this Court not as announcing constitutional doctrine, but, rather, as illustrative of a strict statutory construction. *Indianapolis* v. *Chase Nat. Bk.*, 314 U. S. 63, 76–77. Likewise, in *Treinies* v. *Sunshine Mining Co.*, 308 U. S. 66, by explicitly reserving the question whether the words "Controversies * * * between citizens of different States" in Article III of the Constitution have a different meaning from that given by judicial construction to similar words in the

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reports on the debates discloses no mention of the *Hepburn* decision or its consequences. See 14 Ann. Cong. 874–981 *passim*.

[9] The ruling in *Hepburn & Dundas* v. *Ellzey* has been extended to proscribe suits in the federal courts by citizens of the territories, and, as so enlarged, consistently followed by this Court and the inferior federal courts. *New Orleans* v. *Winter*, 1 Wheat. 91; *Barney* v. *Baltimore City*, 6 Wall. 280; *Hooe* v. *Jamieson*, 166 U. S. 395; *In re Massachusetts*, 197 U. S. 482; *Watson* v. *Brooks*, 13 Fed. 540 (C. C. D. Ore.); *Darst* v. *City of Peoria*, 13 Fed. 561 (C. C. N. D. Ill.); *Land Company* v. *Elkins*, 20 Fed. 545 (C. C. S. D. N. Y.); *Seddon* v. *Virginia, etc., Co.*, 36 Fed. 6 (C. C. W. D. Va.); *Maxwell* v. *Federal Gold & Copper Co.*, 155 Fed. 110 (C. C. A. 8); *Mutual Life Ins. Co.* v. *Lott*, 275 Fed. 365 (S. D. Calif.); *Anderson* v. *U. S. Fidelity & Guaranty Co.*, 8 F. 2d 428 (S. D. Fla.); *Cissel* v. *McDonald*, Fed. Cas. No. 2,729 (C. C. S. D. N. Y.); *Vasse* v. *Miffin*, Fed. Cas. No. 16,895 (C. C. E. D. Penna.); *Westcott* v. *Fairfield*, Fed. Cas. No. 17,418 (C. C. D. N. J.); and see cases cited *supra*, p. 14, n. 4; see, also, *Downes* v. *Bidwell*, 182 U. S. 244, 259, 270, and cases cited in Rathvon and Keeffe, *Washingtonians and Roumanians*, (1948) 27 Nebraska L. R. 375, 377 (n. 14), 378 (n. 20).

Judiciary Act of 1789, the Court again, in effect, indicated the narrow confines of the *Hepburn* precedent. See Chafee, *The Federal Interpleader Act of 1936*, (1936) 45 Yale L. J. 963, 973; Chafee, *Federal Interpleader Since the Act of 1936*, (1940) 49 Yale L. J. 377, 395–398.

When the Constitution was written, ratified, and put into operation, the federal district which Article I, § 8, cl. 17, contemplated had not yet been established. It was not until 1790 that a "district of territory" composed of lands ceded by the States of Maryland and Virginia was accepted for the permanent seat of the Government of the United States; it was not until 1800 that the District became the seat of the national Government; and it was not until 1801 and 1802 that governmental organization was provided for its inhabitants. See Act of July 16, 1790, 1 Stat. 130; Act of February 27, 1801, 2 Stat. 103; Act of May 3, 1802, 2 Stat. 195. There is no proof available that the founders ever considered the question whether the federal courts should or should not be open to the citizens of the federal district on the same basis as to the citizens of the States proper. There is, therefore, no reason why the District of Columbia should be read out of Article III, but, to the contrary, as will be shown below, there are sound reasons of policy for not doing so. As has already been noted,

Hepburn & Dundas v. *Ellzey*, 2 Cr. 445, does not preclude, but, contrariwise, invites legislative action to eliminate the discrimination disclosed by that case. See *First Carolinas Joint Stock Land Bank* v. *Page*, 2 F. Supp. 529, 530 (M. D. N. C.). The terms of Article III, like all words in the Constitution, should be spared a reading of "stultifying narrowness" (*United States* v. *Classic*, 313 U. S. 299, 320) and should be construed to embrace within the judicial power over diverse citizenship cases those affecting citizens of the District of Columbia as well as of the States proper. The Act of April 20, 1940, was, therefore, an appropriate exercise of the judicial power defined in Article III and, consequently, a valid enactment of Congress.[19]

[19] It is of interest that in the only other federated nation in which a question analogous to that here in issue appears to have arisen, the courts have without difficulty accepted the federal district as a "State" on a par with the constituent members of the confederacy. In the Argentine, the Constitution provides for a dual system of courts similar to that in the United States and for a diversity jurisdiction in the federal courts in cases between inhabitants of different provinces and between Argentine citizens and foreigners. The interpretation of this section and of other provisions of the Argentine constitution has been much influenced by United States precedents. Nevertheless, the assimilation by statute of the inhabitants of the capital territory to inhabitants of a province for purposes of this diversity clause has not been questioned. *Demarchi* v. *Olmos*, 29 Fallos de la S. C. 363; see Riesenfeld and Hazard, *Federal Courts in Foreign Systems*, (1948) 13 Law and Contemporary Problems 29, 44–45, n. 130.

II

The Act of April 20, 1940, was a valid exercise of the plenary power of Congress to legislate for the District

There is a further reason for sustaining the Act of April 20, 1940. As the Committee on the Judiciary of the House of Representatives stated when it recommended enactment of the statute, the Act "is a reasonable exercise of the constitutional power of Congress to legislate for the District of Columbia and for the Territories." (H. Rep. No. 1756, 76th Cong., 3d sess., p. 3). Article I, § 8, cls. 17 and 18 afford ample authority for enactment of the Act of April 20, 1940, so far as the District of Columbia is concerned.

Article I, § 8, cl. 17 empowers Congress "To exercise exclusive legislation in all Cases whatsoever" over the federal district. Clause 18 authorizes Congress "To make all laws which shall be necessary and proper for carrying [that power] into Execution." The sweeping and inclusive character of this congressional power over the District of Columbia and its citizens has often been proclaimed. See, for example, *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 619; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434–435; *Shoemaker* v. *United States*, 147 U. S. 282, 300; *O'Donoghue* v. *United States*, 289 U. S. 516, 539; *Capital Traction Co.*

v. *Hof*, 174 U. S. 1, 5; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 147; *Downes* v. *Bidwell*, 182 U. S. 244, 289–290 (White, J., concurring); *Neild* v. *District of Columbia*, 110 F. 2d 246, 249–251 (App. D. C.). Equally well established is the right of Congress, in exercise of that power, to create inferior federal courts for the hearing and determination of controversies affecting the District's citizens. *O'Donoghue* v. *United States*, *supra*, at 545–548; see, also, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428, 442–443; *Postum Cereal Co.* v. *California Fig Nut Co.*, 272 U. S. 693.

For, Article III "does not express the full authority of Congress to create courts." *Ex parte Bakelite Corp.*, 279 U. S. 438, 449. In addition to the power derived from that article, from which stems the authority to establish the so-called "constitutional" courts, Congress may create so-called "legislative" or "statutory" courts, to aid it in carrying out the numerous other functions entrusted to it. *American Insurance Co.* v. *Canter*, 1 Pet. 511. Resort to such "legislative" courts has been frequent. Thus, the territorial courts, are creatures not of Article III but rather of the power, that granted by Article IV, § 3, cl. 2, to make "all needful Rules and Regulations respecting the Territory" of the United States. *American Insurance Co.* v. *Canter*, *supra*; *McAllister* v. *United States*, 141

U. S. 174. The Court of Customs Appeals was established as an exercise of the powers to lay and collect duties on imports and to adopt any appropriate means of carrying that power into execution, provided by Article I, § 8, cls. 1 and 18. *Ex parte Bakelite Corporation*, 279 U. S. 438. The Court of Claims is a tribunal created in aid of the congressional authority granted by Article I, § 8, cl. 1 to pay the debts of the United States. *Williams* v. *United States*, 289 U. S. 553. Similarly, the courts of the District of Columbia, though in part "constitutional" in character, are also an expression of powers vested in Congress by Article I of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516. See, also, Katz, *Federal Legislative Courts*, (1930) 43 Harv. Law Rev. 894."

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[11] In light of this well-established congressional authority in addition to that derived from Article III, Chief Justice Stone's statement in *Lockerty* v. *Phillips*, 319 U. S. 182, 187, that "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution," can be explained only as intended to refer to the "constitutional" courts, or, in the alternative (and what seems less likely), to renew an earlier suggestion of the Court, that the enumeration of classes of litigation in Article III is by no means exclusive and that the judicial power of the United States is far broader than that article of the Constitution suggests. See *Kansas* v. *Colorado*, 206 U. S. 46, 82–83; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. R. 853, 854–855; Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. R. 894, 918.

Thus, the power to legislate for the District includes the power to make available to its citizens national courts having the same general character and jurisdiction as the "constitutional" courts open to citizens of the States proper. *O'Donoghue* v. *United States,* 289 U. S. 516, 540–541. On like principle, it would seem that the power to legislate for the District must be deemed to include the power to enable its citizens, in those cases in which the Constitution secures a like privilege to the citizens of the States, to resort to the federal courts already created in the States proper. The grant of diversity jurisdiction to the federal courts was designed to provide a forum free of the supposed prejudices of the local courts against aliens and citizens of other, "foreign" States. *Serè* v. *Pitot,* 6 Cr. 332, 337–338; *Bank of the United States* v. *Deveaux,* 5 Cr. 61; 87; *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 111–112; *The Federalist,* No. 80; 2 Story, *Commentaries on the Constitution* (5th ed., 1891), §§ 1690–1692; Friendly, *The Historic Basis of Diversity Jurisdiction,* (1928) 41 Harv. L. Rev. 483.[12] To the extent such prejudices are still ex-

[12] There is considerable question whether the diversity clause was grounded on a real experience of prejudice. A recent study of the available historical materials suggests that the diversity jurisdiction of the federal courts may fairly be said to be the product of three factors, the relative weight of which cannot now be assessed: (1) the desire to avoid regional prejudice against commercial litigants, based in small part on experience and in large part on common sense

tant and continue to justify the access afforded "foreign" citizens to the federal courts, they impair the interests of District of Columbia litigants as well as those domiciled in the States proper. There was no more reason, in 1800, to have feared prejudice against Maryland citizens in the Virginia courts than to have feared prejudice there against residents of Georgetown and Washington, who only the year before had been citizens of Maryland. There is no more reason now to expect prejudice against Maryland citizens than against those of the District.[13]

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anticipation; (2) the desire to permit commercial, manufacturing, and speculative interests to litigate their controversies, and particularly their controversies with other classes, before judges who would be firmly tied to their own interests; and (3) the desire to achieve the more efficient administration of justice for the classes thus benefited. Frank, *Historical Bases of the Federal Judicial System*, (1948) 13 Law and Contemporary Problems 3, 28.

[13] The justification for and the wisdom of extending the federal judicial power to diversity cases are not in issue here, and it would serve no useful purpose to reiterate the arguments for or against such extension. All aspects of that debate seem to have been covered in the struggle over the bills introduced by Senator Norris, Representative LaGuardia, and others, in the Seventy-Second Congress, to abolish or limit the federal diversity jurisdiction (S. 939, H. R. 11508, S. 937, H. R. 10594, H. R. 4526, all 72d Cong., 1st sess.). Presenting the argument for curtailment or abolition are: Sen. Rep. No. 530, 72d Cong., 1st sess.; Sen. Rep. 701, 72d Cong., 1st sess.; Frankfurter, *Distribution of Judicial Power between United States and State Courts*, (1928) 13 Corn. L. Q. 499; Frankfurter, *A Note on Diversity Jurisdiction—In Reply to Professor Yntema*, (1931) 79 U. Pa. L. R. 1097;

The majority of the court below, however, rejects the rationale founded on the Article I powers over the District for two reasons: *First,* it says that although the congressional power over the District of Columbia is plenary, it is limited territorially to the District and cannot be exercised beyond its confines. *Second,* it says that although *O'Donoghue* v. *United States,* 289 U. S. 516, sanctions the merger of non-Article III judicial functions with Article III judicial functions in the "constitutional" courts of the District of Columbia, such a merger is prohibited in the "constitutional" courts which Congress has created in the States proper. We submit that neither of these reasons is sound or affords any justification for striking down the Act of April 20, 1940.

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and Clark, *Diversity of Citizenship Jurisdiction in the Federal Courts,* (1933) 19 A. B. A. J. 499. Presenting the argument for retention of diversity jurisdiction are: Yntema and Jaffin, *Preliminary Analysis of Concurrent Jurisdiction,* (1931) 79 U. Pa. L. R. 869; *Limiting Jurisdiction of Federal Courts*—Comment by Members of Chicago University Law School Faculty, (1932) 31 Mich. L. R. 59; Parker, *The Federal Jurisdiction and Recent Attacks Upon It,* (1932) 18 A. B. A. J. 433; Howland, *Shall Federal Jurisdiction of Controversies between Citizens of Different States be Preserved?,* (1932) 18 A. B. A. J. 499; Yntema, *The Jurisdiction of Federal Courts in Controversies between Citizens of Different States,* (1933) 19 A. B. A. J. 71, 149, 265.

Our point is that if diversity jurisdiction is to be maintained at all, the logic for its application to the citizens of the District of Columbia is as cogent as that for its retention for the citizens of the States proper and for aliens.

A. The plenary power of Congress over the District of Columbia and its citizens may be exercised beyond the confines of the District

The Court's opinion in *Cohens* v. *Virginia*, 6 Wheat. 264, supplies a complete answer to the suggestion that the congressional power over the District must be restricted to its limited boundaries. In that case, early in the nation's history, this Court announced the broad sweep of the plenary power of Congress over the federal district. If it desired to do so, said the Court, Congress, pursuant to that power, might legislate to bind not only the citizens of the District but the citizens of the States proper as well, and to supersede state laws, which, though contrary, would have to bow to the superior acts of Congress. The plenary power over the federal district, Chief Justice Marshall declared, "like all others which are specified, is conferred on congress as the legislature of the Union; for, strip them of that character, and they would not possess it. In no other character, can it be exercised. In legislating for the district, they necessarily preserve the character of the legislature of the Union; for, it is in that character alone, that the constitution confers on them this power of exclusive legislation" (6 Wheat., at 424). And, again, "The clause which gives exclusive jurisdiction is, unquestionably, a part of the constitution, and, as such, binds all the United States" (*ibid.*). Pointing out the similarity between the power to legislate within the District of Columbia

and that to legislate with respect to forts, arsenals, dock-yards, etc., the Court noted the extensive scope of such authority (6 Wheat., at 428–429):

> * * * the power vested in congress, as the legislature of the United States, to legislate exclusively within any place ceded by a state, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the state in which the act has been committed, the government cannot pursue him into another state, and apprehend him there, but must demand him from the executive power of that other state. If congress were to be considered merely as the local legislature for the fort or other place in which the offence might be committed, then this principle would apply to them as to other local legislatures, and the felon who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the state. But we know that the principle does not apply; and the reason is, that congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all

those incidental powers which are necessary to its complete and effectual execution.

Though the opinion in the *Cohens* case was hotly assailed for sanctioning an appeal to this Court from a state tribunal, it apparently bred no hostility so far as it related to the ambit of the plenary power over the District. See Dodd, *Chief Justice Marshall and Virginia, 1813–1821,* (1907) 12 Amer. Hist. Rev. 776, 781–786. In that respect, it has never seriously been questioned, and this Court has had no reluctance in approving the "extraterritorial" exercise of the power wherever deemed necessary to its proper execution. Thus, in *Embry* v. *Palmer,* 107 U. S. 3, an act of Congress construed to require state courts to give full faith and credit to the judgments of the courts of the District of Columbia was approved as, at least in part, a constitutional exercise of the plenary power vested in Congress over the federal district. And this, although such judgments are not within the reach of the full faith and credit clause and, therefore, like those of foreign countries, would have been, absent the act of Congress, extraterritorially enforceable apart from that clause only to the extent the law of the forum might permit. Cf. *McElmoyle* v. *Cohen,* 13 Pet. 312, 324–325; *Atchison, T. & S. F. Ry.* v. *Sowers,* 213 U. S. 55, 69. See, also, *Picquet* v. *Swan,* Fed. Cas. No. 11,134, p. 611 (C. C. D. Mass., per Story, J.); *Grether*

v. *Wright*, 75 Fed. 742, 756, 757 (C. C. A. 6, per Taft, C. J.), quoted with approval in *O'Donoghue* v. *United States*, 289 U. S. 516, 539–540.

There is, we submit, no justification for more narrowly confining Congress—geographically speaking—when it exercises its plenary power over the District of Columbia and its citizens than when it performs any of the other powers entrusted to it by Article I of the Constitution. As Judge Parker pointed out in his dissent below (R. 21):

> * * * Certainly, if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts (*In re Ross*, 140 U. S. 453) or the United States Court for China (*Ex parte Bakelite Corp.*, 279 U. S. 438, 451), there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District * * *.

Similarly, there is no reason why the broad scope which the federal courts give to the territorial jurisdiction which they derive from the bankruptcy clause of the Constitution, when read in conjunction with the judiciary article (*Mississippi Pub. Corp.* v. *Murphree*, 326 U. S. 438, 442;

Toland v. *Sprague*, 12 Pet. 300; Mussman and Riesenfeld, *Jurisdiction in Bankruptcy*, (1948) 13 Law and Contemporary Problems 88, 89), should be narrowed in the case of jurisdiction derived from the other clause of Article I with respect to governance of the federal district.

As the United States Court of Appeals for the District aptly put it in *Neild* v. *District of Columbia*, 110 F. 2d 246, 250-251:

> * * * Subject only to those prohibitions of the Constitution which act directly or by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other. * * *

B. Congress may invest the federal district courts in the States proper with judicial functions other than those enumerated in Article III

There is no greater force to the contention that the Act of April 20, 1940, was invalid because it required a merger in the federal district courts

of judicial functions incidental to the exercise of Article I powers with judicial powers defined in Article III of the Constitution. *O'Donoghue* v. *United States*, 289 U. S. 516, clearly approves such a merger, at least in the "constitutional" courts of the District of Columbia. There is no reason why it should not also be appropriate in the federal courts in the States proper.

True, there are expressions in certain opinions of this Court which, read out of context, appear to prohibit such a consolidation of functions. Thus, in *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, the Court, parenthetically referring to the "constitutional" courts, notes that "They share in the exercise of the judicial power defined in that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise." Again, in *O'Donoghue* v. *United States*, 289 U. S. 516, 546, the Court says:

> * * * Does the judicial power conferred extend to the cases enumerated in that article [Art. III]? If it does, the judicial power thus conferred is not and cannot be affected by the additional congressional legislation, enacted under Article I, § 8, cl. 17, imposing upon such courts other duties, which, because that special power is limited to the District, Congress cannot impose upon inferior federal courts elsewhere * * *.

We suggest, however, that such statements were intended only to reiterate the familiar rule that *legislative* or *administrative* functions, normally vested in the legislative or executive branches of the Government, as contrasted with *judicial* functions, normally the business of the courts, can be vested in "legislative" or "statutory" courts but never in "constitutional" courts (other than those in the District of Columbia). See *Williams* v. *United States*, 289 U. S. 553, 565–567. Whatever the merit of that rule, it obviously does not proscribe the merger of certain *judicial* functions born of sections of the Constitution other than Article III, with other functions, likewise judicial in character, born of Article III.

Nor is there any justification for so extending the rule. The bar against assignment of administrative and other nonjudicial functions to the federal judiciary had its origin in the doctrine of separation of powers; the vesting of administrative functions in the judiciary, it was feared, would endanger the independence of the courts and would threaten an encroachment on their prerogatives by the legislative and the executive. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40. Such dangers, however, are not presented by a merger of judicial functions, whatever their genesis. The doctrine of separation of powers, though it does find support in the tripartite division of governmental functions into

legislative, executive, and judicial, in the first three articles of the Constitution, neither stems from such a mechanical arrangement nor from Article III alone. The doctrine is founded on the sound policy of separating three essentially different powers of government and making each independent of the others. But where judicial powers alone are being exercised, there is no policy which requires that they be separated because of their varied origin. So long as such powers are judicial in character, even though some may not be derived from Article III, their exercise by the federal courts in no wise impairs the independence of the judiciary.

This is implicit in decisions such as *James* v. *Appel,* 192 U. S. 129, where the Court upheld a territorial statute in face of an attack on it as an usurpation of judicial power and assumed the pertinence of the doctrine of separation of powers even though a territorial court, which derived its judicial power from Article IV, not Article III (*American Insurance Co.* v. *Canter,* 1 Pet. 511), was involved. Again, the doctrine of separation of powers has been considered relevant to naturalization proceedings, although these need not be submitted to the judiciary for determination (*Johannessen* v. *United States,* 225 U. S. 227; Rutledge, J., concurring in *Schneiderman* v. *United States,* 320 U. S. 118, 165) and are thus

not derived from the grant in Article III (*Williams* v. *United States*, 289 U. S. 553, 580).[14]

However important it may be to ascertain the source of judicial power when the tenure of the judges who exercise it is in issue (cf. *O'Donoghue* v. *United States*, 289 U. S. 516, with *Williams* v. *United States*, 289 U. S. 553), such an inquiry is irrelevant, so long as judicial functions are involved, when the question at issue is the power of the federal courts to exercise such functions. See *Comment* (The Distinction Between Legislative and Constitutional Courts), (1933) 43 Yale L. J. 316, 323. The decision of this Court in *Pope* v. *United States*, 323 U. S. 1, makes this quite clear. There, a special act of Congress conferring jurisdiction on the Court of Claims to hear, determine, and render judgment on certain specific claims was held invocative of the "judicial power" of that court, notwithstanding the fact that the statute, as construed by that tribunal, directed it to enter judgment for the claimant in an amount determinable by simple computation on claims which had once been passed

[14] That the doctrine of the separation of powers does not preclude the merger of non-Article III with Article III judicial functions becomes clear too when one recalls that the requirement that judicial acts remain free from legislative interference is not peculiar to our Constitution, but rests on traditions which Anglo-American law has found to be inherent in our system of government. See Mr. Chief Justice Taney's draft opinion in *Gordon* v. *United States*, 117 U. S. 697, 705–706.

on pursuant to its general jurisdiction and determined for the Government. 100 C. Cls. 375. This Court said (323 U. S. 13):

> * * * notwithstanding the retention of * * * administrative duties by the Court of Claims, as in the case of the courts of the District of Columbia, Congress has provided for appellate review of the judgments of both courts rendered in their judicial capacity. And this Court has held, by an unbroken line of decisions, that its appellate jurisdiction, conferred by Art. III, § 2, cl. 2 of the Constitution, extends to the review of such judgments of the Court of Claims * * * and of the courts of the District of Columbia * * * [citing cases].

And, again (323 U. S. at 13–14):

> * * * although the Court of Claims, like the courts of the District of Columbia, exercises non-judicial duties, Congress has also authorized it as an inferior court to perform judicial functions whose exercise is reviewable here. The problem presented here is no different than if Congress had given a like direction to any district court to be followed as in other Tucker Act cases. Its possession of non-judicial functions by direction of Congress presents no more obstacle to appellate review of its judicial determinations by this Court, than does the performance of like functions by the courts of the District of Columbia or by

> state courts whose exercise of judicial power, in the cases specified in Article III, § 2, Cl. 1, of the Constitution, is reviewable here by virtue of Cl. 2 of § 2. * * *

Such a ready acceptance by this Court of jurisdiction in cases involving the exercise of judicial power derived from sources other than Article III of the Constitution deprives the non-merger argument of any force whatever. If this Court, under the Constitution, has the authority to determine such cases on review, the federal district courts have the capacity to hear and decide them in the first instance. See Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. R. 894, 918, 919; McGovney, *A Supreme Court Fiction*, (1943) 56 Harv. L. R. 853, 854–855; Note, (1934) 34 Col. L. R. 344, 353–354.

Finally, to hold such a merger of judicial functions improper would be to condemn the long-existing grants of jurisdiction to the federal district courts to hear suits against the United States. See, *e. g.*, P. L. 773, 80th Cong., 2d sess., sec. 1, §§ 1346, 2671–2680 (embodying, in revised form, the provisions of the Tucker Act and the Federal Tort Claims Act). For, in *Williams* v. *United States*, 289 U. S. 553, this Court held the adjudication of claims against the United States, although a judicial function, outside the pale of "judicial power" as defined in Article III; such judicial functions, it was held, were derived rather from the power to pay the debts of the

United States granted to Congress by Article I of the Constitution (289 U. S. at 572–581). These non-Article III suits against the Government have, nevertheless, long been entertained by the federal district courts of the States proper, and that with the approval of this Court. See, for example, *United States* v. *Sherwood*, 312 U. S. 584; *United States* v. *Pfitsch*, 256 U. S. 547; *Pope* v. *United States*, 323 U. S. 1, 14; see, also, Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. Rev. 894, 917–919; *Note*, (1934) 34 Col. L. R. 344, 355, n. 66, 67. In such circumstances, it is inconceivable that the exercise of jurisdiction over other similarly non-Article III judicial functions, the adjudication of controversies between District of Columbia citizens and citizens of the states proper, should now be disapproved. Certainly, the decision of such cases—the present suit, for example—involves the exercise of judicial power and is, therefore, susceptible of judicial cognizance by "constitutional" courts. *Gordon* v. *United States*, 2 Wall. 561; *Williams* v. *United States*, 289 U. S. 553, 563–564; 580–581; *Hayburn's Case*, 2 Dall. 409.[15]

[15] There is one further argument which conceivably may be advanced in support of the Act of April 20, 1940. That statute was, of course, one of the laws of the United States. And, consequently, it might be urged that a suit brought in reliance on its provisions is a case "arising under * * * the laws of the United States," within the definition of judicial power contained in Article III. Such an argument would

The Act of April 20, 1940, then, as we have demonstrated, is supportable as a legal enactment on either of two alternative theories: *first*, as an appropriate extension of the judicial power of the United States defined in Article III of the Constitution; *second*, as a valid exercise of the plenary power of Congress over the District of Columbia and its citizens. The logic of either of these lines of argument is real and irrefutable, and both are supported by weighty considerations of policy. We refer not merely to the usual presumption of constitutionality, but more particularly to the fact that the Act of April 20, 1940, was designed to remove a discrimination to which the citizens of the District of Columbia had been subjected, without any apparent reason

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find considerable support in *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423, where the United States brought suit in the Court of Claims, pursuant to a special jurisdictional act, to ascertain whether an award which had been procured by the mining company had been based on fraud. This Court unanimously rejected an attack on the judgment of the Court of Claims grounded on the theory that there was no "case or controversy" under Article III, § 2, on which jurisdiction could be based, holding that a case did exist under the jurisdictional act. 175 U. S. at 455. But cf. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 482–485. See, also, *Southern Kansas Ry. Co.* v. *Briscoe*, 144 U. S. 133; *Osborn* v. *United States*, 9 Wheat. 738; Note, *Section 301 (a) of the Taft-Hartley Act: A Constitutional Problem of Federal Jurisdiction*, (1948) 57 Yale L. J. 630, 632–637; Rathvon and Keeffe, *Washingtonians and Rumanians*, (1948) 27 Nebraska L. R. 375, 388, n. 69; cf. Katz, *Federal Legislative Courts*, (1930) 43 Harv. L. Rev. 894, 902–903.

in national policy, for one hundred and thirty-five years.

Chief Justice Marshall, when announcing the Court's opinion in *Hepburn & Dundas* v. *Ellzey*, 2 Cr. 445, regretfully remarked the discrimination which the Court's construction of the Judiciary Act of 1789 visited upon the citizens of the District of Columbia, and he invited legislative action to remove that discrimination (2 Cr. at 453):

> It is true, that as citizens of the United States, and of that particular district which is subject to the jurisdiction of congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them. But this is a subject for legislative, not for judicial consideration.

The Act of April 20, 1940, was Congress' belated response to that invitation to legislative action proffered by the Court. See H. Rep. No. 1756, 76th Cong., 3d sess., p. 3:

> * * * It should be borne in mind that the citizens of the District of Columbia and of the Territories are citizens of the United States. They are subject to the burdens and obligations of such citizenship just as are the citizens of the 48 States. Simple justice requires that they should share the rights and privileges of such citizenship insofar as Congress has authority to confer it upon them. This is the real intent of the Constitution.

As we have already noted, *supra*, pp. 25–26, 30–31, there is no apparent reason for discriminating against the District's citizens, and a study of the historical materials discloses no possible rationalization for such discrimination. If the federal courts are to be open on the basis of diversity of citizenship to the citizens of the States proper and to aliens, even when resident in the District of Columbia, it seems no more than fair that similar access should be permitted the citizens of the District.

The District of Columbia has grown from a partially rural community of 14,093 persons in 1800 to an exclusively urban metropolis with a population of 663,091 in 1940; and of these residents in 1940, 652,490 were citizens of the United States.[16]

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[16] These are the official census statistics. U. S. Department of Commerce, *Sixteenth Census of United States*, 1940, Population, vol. II (1), pp. 955, 960. It is estimated that the population had risen to 861,000 by 1947 (U. S. Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P–25, No. 12, p. 7). Unofficial sources indicate a substantially smaller population in 1800 than that indicated by the official census—somewhere between 3,000 to 6,000—for that part of the then District which still remains under federal sovereignty. See Letter of Thomas Jefferson to Joel Barlow, May 3, 1802, X *Writings of Jefferson* (Mem. ed. 1903), p. 321; 3 Beveridge, *Life of Marshall* (1919), p. 8.

There are no reliable statistics as to the number of permanent domiciliaries in the District. We are informed, however, that *The Washington Post*, in connection with a recent survey of opinion in the District on local self-government, polling adults in 400 families selected as a "random area sample of households" on a basis similar to that used by the Census Bureau and the Bureau of Labor Statistics, found that the

Its citizens trade and travel throughout the United States and every day engage in numerous transactions with citizens of the States proper. As Judge Parker noted below (R. 21–22):

> The right to invoke the jurisdiction of the only sovereignty to which they owe allegiance and to which they can look for protection has become an increasingly important one and has at length been recognized by Congress in the passage of legislation, which opens the federal courts to them on the same condition that these courts are open to other citizens of the Republic.

It is only meet that they too, as well as the citizens of the States proper, should be permitted to sue in the federal courts.

As already noted, when the Constitution was drafted and when it was ratified, there was no federal district. The citizens who subsequently,

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following percentages of the sample had resided in the District of Columbia for these periods:

Percent of sample	*No of years in District*
2	less than 1 year.
14	1 year but less than 5 years.
20	5 years but less than 10 years.
43	more than 10 years.
21	native born.

(See *The Washington Post*, Sunday, February 1, 1948, sec. II, p. 1. The Office of the Collector of Taxes for the District of Columbia advises us that approximately 99,100 taxable income tax returns were filed by individual taxpayers for the year 1947, of which approximately half were joint returns; and that about 3,550 returns were filed by corporations for that year.

in 1801, became citizens of the newly created District of Columbia[17] were at that time citizens of the States of Maryland and Virginia. Only later were the lands upon which these citizens resided ceded to the National Government. As this Court has said in another but closely related connection, "it is not reasonable to assume that the cession stripped them" of rights previously theirs under the new Constitution, "and that it was intended that at the very seat of the national government the people should be less fortified by the guaranty of an independent judiciary than in other parts of the Union." *O'Donoghue* v. *United States,* 289 U. S. 516, 540; see, also, *Downes* v. *Bidwell,* 182 U. S. 244, 260–261; cf. *Callan* v. *Wilson,* 127 U. S. 540, 550.

The holding, in 1805, that the District's citizens were barred from federal courts open not only to their Maryland and Virginia neighbors, but to all aliens, even those residing in the District of Columbia, was an "extraordinary" decision. *Hepburn & Dundas* v. *Ellzey,* 2 Cr. 445, 453. To hold, as the court below does, that the legislative action invited by this Court in the *Hepburn* case

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[17] For a narrative account of the organization of the District, see *Morris* v. *United States,* 174 U. S. 196. See, also Naylor, *The District of Columbia, Its Legal Status,* (1932) 21 Geo. L. J. 21; Caemmerer, *A Manual on the Origin and Development of Washington* (1939); Sen. Doc. No. 178, 75th Cong., 3d sess., pp. 1–33 *passim.*

is futile to eliminate the discrimination seems unjustifiable.[18]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Act of April 20, 1940, should be held constitutional and that the judgment below should accordingly be reversed.

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[18] The considerations of policy in support of the Act of April 20, 1940, are amply developed in the dissenting opinion of Circuit Judge Parker in the court below and that of Circuit Judge Evans in *Central States Cooperatives* v. *Watson Bros. Transportation Co.*, 165 F. 2d 392 (C. C. A. 7), petition for certiorari pending, No. 43, this Term. See, also, McKenna, *Diversity of Citizenship Clause Extended*, (1940) 29 Geo. L. J. 193; Dykes and Keeffe, *The 1940 Amendment to the Diversity of Citizenship Clause*, (1946) 21 Tulane L. R. 171; Rathvon and Keeffe, *Washingtonians and Rotmanians* (1948) 27 Nebraska L. R. 375; (1943) 5 Louisiana L. R. 478; (1943) 11 George Washington L. R. 258; (1942) 21 Texas L. R. 83; (1946) 46 Col. L. R. 125; Note (1947), 60 Harv. L. R. 424, 426-428; (1948) 61 Harv. L. R. 885; (1948) 46 Mich. L. R. 557. But see, Walker, *Citizens of the District of Columbia and the Federal Diversity Jurisdiction*, (1948) 15 D. C. Bar Assn. J. 55; *Note* (1946), 55 Yale L. J. 600.

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